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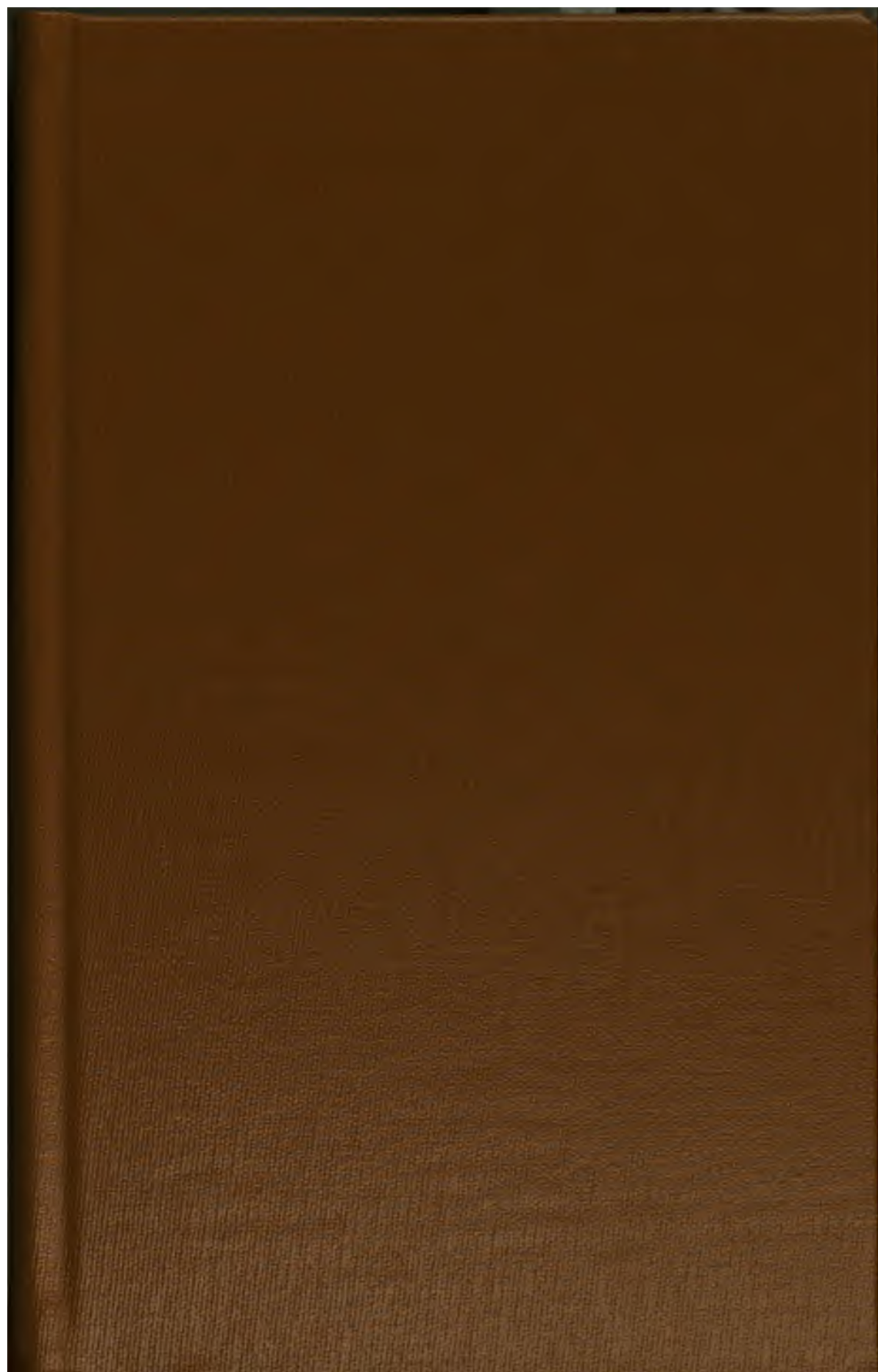
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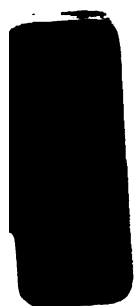
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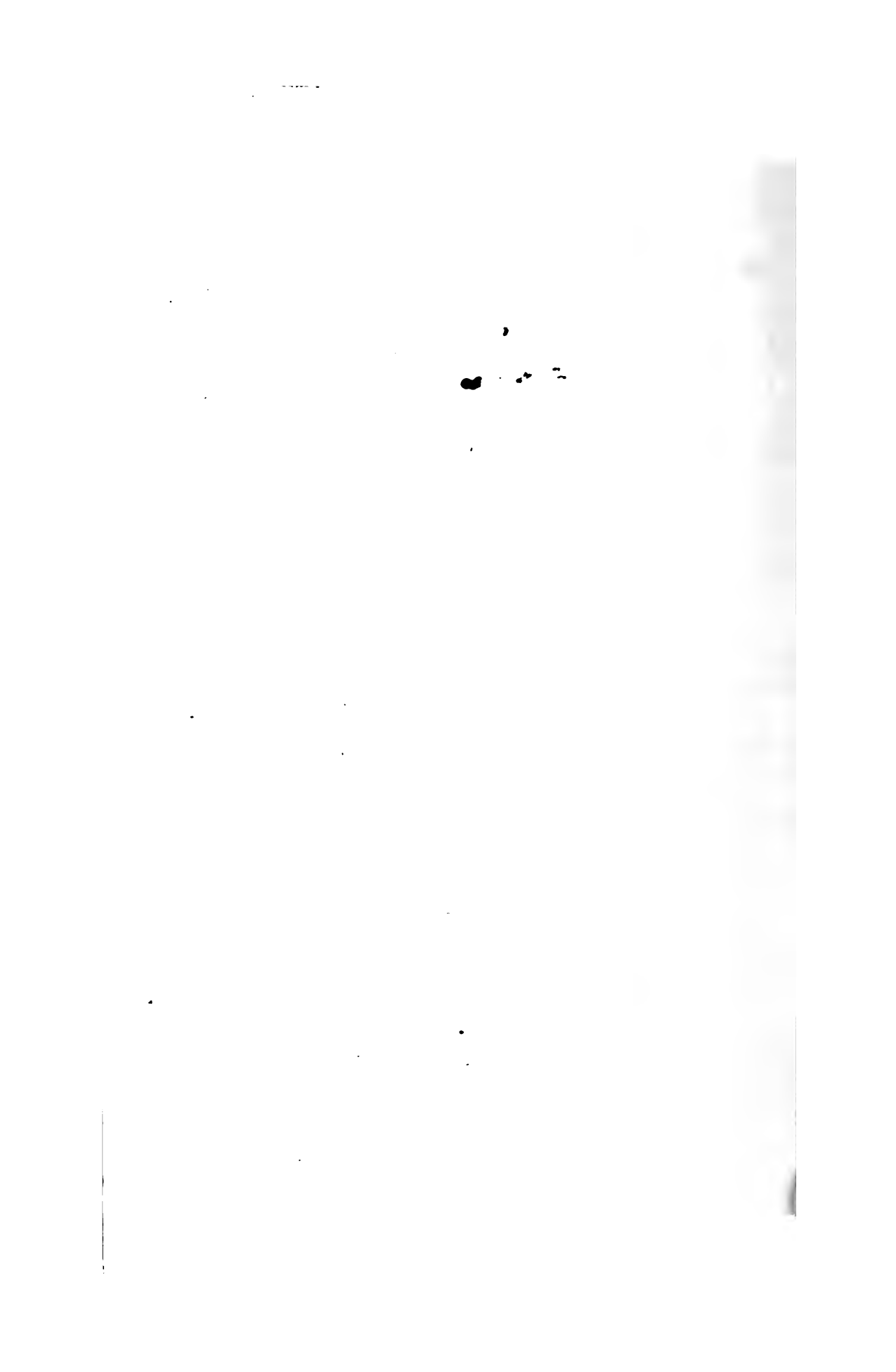
A
PRACTICAL TREATISE
OF
ASSETS,
DEBTS AND INCUMBRANCES.

By JAMES RAM,
OF THE INNER TEMPLE, M. A., BARRISTER AT LAW.

FROM THE LONDON EDITION.

PUBLISHED BY
JOHN S. LITTELL,
Law Bookseller and Publisher,
No. 11 GEORGE STREET,
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PREFACE.

It, because by far the greatest part of the Law of England lies scattered in the Reports of Cases, that during several centuries have come before the Courts, and a desire to possess the knowledge of so much only of this law, as may be strictly necessary for professional practice, would be attended with extreme difficulty, if the only path to it lay through the volumes of Reports themselves, the least successful attempt to collect together any part of these materials, and embody them in a separate treatise, may fairly claim both gentle criticism, and, perhaps, some gratitude; on the other hand, it is necessary to admit that these favours ought not to be won, except by applying to the subject treated of, as much research, thought, and labour, as the author is capable of bestowing on it.

The task of a law writer can very rarely be light, if he undertakes personally to read the cases reported, and to state the effect of them. To ascertain the decision in a single case very frequently requires much patient thought and investigation; and it will readily, therefore, be apprehended, that to gather the law that results from a series of cases, beginning perhaps at a distant period, and most usually determined in different Courts, and by judges of unequal eminence, is sometimes impracticable and is constantly exposed to the danger of error. The authority of a case often depends on the Court in which, or the learning of the judge by whom, it was decided. A case at *Nisi Prius* carries less weight, than one decided by assembled judges at Westminster; (a) and it is certain that, generally speaking, a judgment by a Court in Westminster Hall yields in importance to a decision in the House of Lords. (b) The authority of a case may, moreover, be strengthened by the circumstance, that it was determined by a "strong" Court, (c) by a Court composed of judges of great reputation, (d) or by, or with the concurrence, of a single judge distinguished for his learning; (e) and be weakened by the circumstance, that the Court were equally divided, (f) or were not unani-

(a) 2 D. & E. 74; 7 D. & E. 394; 5 Taunt. 195; 2 Bing. 90; 15 Ves. 262.

(b) 6 Ves. 547; 3 Swanst. 152.

(c) 5 Taunt. 671.

(d) 7 Price, 347; 6 Bing. 22.

(e) An eminence of this kind has been attained (among other judges) by Sir M. Hale (4 D. & E. 311; 5 D. & E. 556;) Sir J. Holt (6 D. & E. 423; 7 D. & E. 743;) Lord Hard-

wicke (7 D. & E. 416; 7 Price, 277;) Lord Mansfield (2 D. & E. 79; 6 D. & E. 423; 7 D. & E. 222; 8 D. & E. 28; 2 Bing. 309;) Lord Thurlow (5 Ves. 538;) Lord Alvanley (15 East, 198; 3 M. & S. 536; 4 Bing. 242; and Sir V. Gibbs (3 Bing. 391, 643; 5 Bing. 547; 1 B. & C. 251.)

(f) 3 D. & E. 631; 14 East, 621.

mous.(g) Besides the trouble of fixing the value of cases, in searching for the present law, farther difficulties commonly occur. One authority, or one series of authorities, is contradicted by another; a modern case, and one determined some years ago,(h) or even two recent cases,(i) are found to be much, if not directly, at variance; and, more perplexing still, cases, that for years have uniformly flowed in a particular direction, are not unfrequently met by an opposing stream, strong enough to stem the older current, and to make it doubtful what course they will hereafter take.(j) The value of a case is clear, and it remains uncontradicted; and yet to know the effect of it, it is constantly needful to inquire, if it determines a general question, or if it is decided merely on its own particular circumstances. The importance of this inquiry is demonstrated by the fact, that, in a multitude of instances, the Court anxiously guards against misconstruction, by expressly stating in terms, that it decides on the particular circumstances only, and leaves the general question untouched.(k) When it is required to state the grounds of a decision, especial care appears to be necessary, accurately to collect them from the facts of the case, or the language of the judgment. "Read not to contradict and confute, nor to believe and take for granted, but to weigh and consider," is advice, that seems peculiarly to apply to a writer on English Law.

Enough, perhaps, has been said to make it apparent, that the least successful Law-Treatise may fairly claim for itself gentle criticism. The duties of the writer are manifested by the circumstance, that common experience testifies that, in actual practice, it is often essential to act on the instant, and frequently a treatise must be, and consequently is, depended on, as containing a faithful statement of the law.

The chief objects of the present volume are, to be an assistance to persons providing by will for the payment of debts, and mortgages and other incumbrances, and legacies; and, in plain language and practical form, to convey useful information to creditors, who have demands against the estate of a person deceased, and to unfold to executors, administrators, and trustees, the duties which their office imposes on them, and the responsibilities they incur by accepting it.

In a great number of instances, the Author has mentioned in the notes, the occasion, on which a case there referred to, has been cited on the bench. For often a judge's notice of a case may augment or lessen the value of it as authority, and regulate its importance on future questions. That notice may be materially useful, amongst other examples,—when it explains the judgment delivered in the case cited, and which, according to the report of it, is not very intelligible:(l) when the case is noticed by the same judge, by whom it was decided, and, on citing it, he expresses his adherence to it,(m) or explains the ground or principle of his decision,(n) or the meaning of his judgment, which has been misun-

(g) 5 D. & E. 257; Coop. 267.

(h) 1 Ves. jun. 495; Eaton v. Jaques, Doug. 438 (ed. 1783,) and Williams v. Bosanquet, 1 Brod. & B. 238.

(i) Gibson v. Dickie, 3 M. & S. 463, and Binnington v. Wallis, 4 Barn. & Ald. 650; Attree v. Scutt, 6 East, 476, and Garland v. Jekyll, 2 Bing. 273.

(j) 3 Bing. 647; 4 Bing. 241.

(k) 8 Taunt. 55, 56; 12 Ves. 182; Jacob, 38.

(l) 15 Ves. 394.

(m) 7 D. & E. 437; 2 Eden, 180; 1 Turn. & R. 240.

(n) 2 Ves. 655; Amb. 301; 1 Turn. & R. 240.

PREFACE.

V

derstood:(*o*) when the judge who cites the case was counsel in the cause, and states the nature of it:(*p*) when the judge has his own note of the case, and cites it from that note:(*q*) when such judicial notice of a case discloses the end of it:(*r*) when it testifies the authority of the case cited, and expresses an opinion that it ought to be followed:(*s*) when it is expressive of approbation of a case, the soundness of which has been attacked:(*t*) when it contains an opinion that the case cited is not law,(*u*) or a statement that it has not been approved of.(*v*)

*77, Chancery Lane,
27th August, 1832.*

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|--|---|
| (<i>o</i>) 7 Ves. 95; 1 Turn. & R. 238, 239,
244. | (<i>r</i>) 2 Ld. Raym. 1148, 1150; 4 Madd.
278, 279. |
| (<i>p</i>) 1 Atk. 525; 1 Sch. & Lef. 294, 295;
McClel. 525. | (<i>s</i>) 6 Ves. 565; 8 Ves. 287. |
| (<i>q</i>) 1 Sch. & Lef. 294. | (<i>t</i>) 4 Ves. 323; 1 Sim. 192, 193. |
| | (<i>u</i>) 3 Ves. 14, 16. |
| | (<i>v</i>) 2 Barn. & Adolph. 577. |

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CORRECTION.

Page 7, n.(p).—By a late Act, 1 William IV. c. 47, s. 10, the parol is now not allowed to demur, in cases of action or suit by or against an infant.
See p. 233.

A

TREATISE

ON

THE LAW OF ASSETS,

&c.

CHAPTER I.

OF CERTAIN KINDS OF DEBTS.

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SECTION I.

1. DEBTS OF RECORD.—2. DEBTS BY SPECIALTY.—3. DEBTS BY SIMPLE CONTRACT.

1. OF debts, some are called debts of record, some by special contract or specialty, and others debts by simple contract.(a)

When a debt is by action at law recovered by judgment of a Court of Record, or is acknowledged by a common law recognizance, recorded by enrolment in a Court of Record, such *judgment debt and [*2] debt by recognizance are each of them a debt of record.(b)

2. A creditor whose debt is secured by an instrument under hand and seal, as by a bond or other deed, or by an instrument under hand and

(a) 2 Bl. Com. 464, 465.

(b) 4 Co. 60, Hob. 195, 196, Vaugh. 102, 103, 2 Bl. Com. 465, 511; Bothomly v. Lord Fairfax, 1 P. W. 334. 2 Vern. 750. See Pothergill v. Kendrick, 2 Vern. 234. On the meaning of the word Record, and the ex-
 pression 'Court of Record,' see Glanvil, lib. 9, c. 9, 10, 11, Co. Litt. 117 b., 251 b., 260 a., 3 Inst. 71, Spelm. Gloss. Recordum; also Dougl. Rep. 5; and Glynn v. Thorpe, 3 Barn. & Ald. 153; and Rex v. Bingham, 3 Y. & J. 101. A matter of record, as a fine,

seal only, and which is not a deed because it is not delivered as a deed, (c) is a creditor by special contract, and the money so secured is therefore a specialty debt. (d) Several instances occur in which a creditor, whose debt was secured by deed, or an instrument under hand and seal, has been held to be a specialty creditor. (e) A covenant is a species of contract. But a contract entered into by a person cannot be a covenant, on which an action of covenant will lie against him, unless he contracts by deed executed by him; (f) except in particular cases. (g) It seems, however, that, in some instances, by means of a deed, and the agreement of a person to it, an action of debt will lie against this person, although he never executed the deed. (h) And where such deed and agreement will support an action of debt, the creditor appears to be a creditor by specialty. (i) The word covenant, when unexplained, commonly signifies a contract entered into by deed. (k) A creditor, whose debt is secured by a covenant, is a creditor by specialty. (l) "If a covenant is broken, though the damages are unliquidated, the covenantee is a specialty creditor." (m) A covenant to settle particular land, of which the covenantor is seised, creates in equity a specific lien on it. (n) Also a covenant generally to settle land may in equity create a specific lien on land, of which the covenantor is then seised; (o) or, if he is not then seised of any land, on land which he may afterwards purchase. (p) A covenant generally to settle land, and which

and a deed recorded, are distinguishable, Co. Litt. 251 b.; see also 283 a. The enrolment of Recognizances is governed by the statute law; 23 H. VIII. c. 6; 29 C. II. c. 3, sec. 18; and 8 Geo. I. c. 25. But the enrolment of deeds is, it is observable, of great antiquity in this country, and was probably not introduced by the legislature. It is recommended by Britton, p. 101, ed. 1640, and Fleta, lib. 3, c. 14, p. 200, ed. 1685, as a means to preserve evidence of the contents of the deed. On the subject of admitting a copy of an enrolled deed to be evidence, see *Smartie v. Williams*, 3 Lev. 387; *Holcroft v. Smith*, 2 Freem. 259, 260; and 1 Phil. on Evid. 6th ed. 443.

(c) Co. Litt. 35 b.; *Brown v. Vawser*, 4 East, 684; *Clement v. Gunhouse*, 5 Espin. Rep. 83; *Shep. Touch.* 57, 60, where it is said, "Note, that albeit a writing, that is not sealed and delivered, may not be used nor pleaded as a deed, yet it may serve and be used as an evidence and proof of the agreement contained therein. And whatsoever may be done by word, without any writing, may much more and better be done by writing [though] unsealed; or sealed, though it be not delivered." When it is said that a deed is "executed," the ordinary meaning of the expression is, that it is sealed and delivered. *Cecil v. Butcher*, 2 J. & W. 571. See on the delivery of a deed, *Doe v. Knight*, 5 B. & C. 671; and on sealing and delivering, *Ex parte Hodgkinson*, 19 Ves. 296.

(d) 2 Bl. Com. 465; *Plumer v. Marchant*, 3 Burr. 1360; *Gifford v. Manley*, Cas. T. Talb. 109.

(e) *Marriott v. Thompson*, Willes, 186, 189; *Primrose v. Bromley*, 1 Atk. 89; *Musson v. May*, 3 Ves. & B. 194; *Tanner v. Byne*, 1 Sim. 160; *Mavor v. Davenport*, 2 Sim. 327.

(f) *Fitzh. N. B.* 145, 146, and ed. 1730, 340, 341, 343; *Metcalfe v. Rycroft*, 6 M. & S. 75; *Burnett v. Lynch*, 5 B. & C. 589, 602, 609.

(g) *Fitzh. N. B.* 146, and ed. 1730, 343; *Wade v. Bemboe*, 1 Leon. 2; *Lord Ewre v. Strickland*, Cro. Jac. 240; *Brett v. Cumberland*, Cro. Jac. 399, 521, 1 Rol. Abr. 517; *Wooton v. Hele*, 1 Mod. 291, 292.

(h) 38 Edw. III. 8; Co. Litt. 231 a; *Bro. Abr. tit. Dette*, 80; *Fitzh. Abr. tit. Dette*, 117.

(i) See 2 Bl. Com. 465; 3 Bl. Com. 155.

(k) *Fitzh. N. B.* 145; 1 Rel. Abr. 517; 3 Swanst. 647, 648; 2 Bl. Com. 304; 3 Bl. Com. 156, 158.

(l) *Benson v. Benson*, 1 P. W. 131; *Earl of Bath v. Earl of Bradford*, 2 Ves. 589; *Plumer v. Marchant*, 3 Burr. 1380.

(m) *Musson v. May*, 3 Ves. & B. 194, 197.

(n) *Freemoult v. Dedire*, 1 P. W. 429; *Finch v. Earl of Winchelsea*, ib. 277. See *Bayly v. Ekins*, 2 Dick. 632.

(o) *Roundell v. Breary*, 2 Vern. 482, cited 3 Atk. 327.

(p) *Tooke v. Hastings*, 2 Vern. 97, cited 3 Atk. 329; *Wilcocks v. Wilcocks*, 2 Vern. 558; *Deacon v. Smith*, 3 Atk. 323; *Sowden v. Sowden*, 1 Bro. C. C. 582, 1 Cox, 165.

does not bind any land specifically, makes the covenantee a specialty creditor. (q) And a contract, which, by the word covenant or agreement, is by deed made to lay out a sum of money in land to be settled, creates also a specialty debt. (r) A creditor, whose debt was secured by covenant, has been held to be a specialty creditor, where the covenant was by a lessor, for the lessee's quiet enjoyment during the term; (s) by the grantor of an annuity, that he was seised in fee of the premises charged with it; (t) and by the grantor in a marriage [*4] settlement, that the premises settled were free from incumbrances. (u)

He who contracts a debt by a special contract thereby binds not only himself, but his executors also, although the latter are for such purpose not named in it. But, unless so named, his heir is not bound by it. (v) It appears that a specialty debt may be created by an instrument under hand and seal, although it is not a deed. (w) And if in such instrument neither the heir nor the executor of the debtor is named, the executor will, and the heir will not, be bound by it. (x)

3. A creditor whose debt is secured by a promise made verbally only, and expressed or implied, or by either of the negotiable instruments, a bill of exchange or promissory note, or by writing unsealed, is a creditor by simple contract. (y)

A court of law has, amongst other instances, (z) held to be a debt by simple contract, a debt recovered by judgment of the Supreme Court of Jamaica. (a)

Amongst debts held by a Court of Equity to be by simple contract, (b) that court has determined to be a debt of this nature, the balance of an open and mutual account, whereof all the particulars were on simple contract; (c) also money that was recovered *by a judgment or sentence in France. (d) And the same court has [*5] held,—that where a legacy was bequeathed, and the executor committed a devastavit, such devastavit made the legatee a simple contract creditor of the executor; (e) that where in a marriage settlement a sum of money was made subject to the disposition of the wife, and the husband thereby

(q) *Freemount v. Dedire*, 1 P. W. 439; *Deacon v. Smith*, 3 Atk. 323, 327; *Cheveley v. Stone*, 2 Dick. 782.

(r) *Benson v. Benson*, 1 P. W. 129. See likewise 3 Atk. 327, 3 Swanst. 647, 648, and 19 Ves. 638.

(s) *Earl of Bath v. Earl of Bradford*, 2 Ves. 587.

(t) *Giles v. Roe*, 2 Dick. 570.

(u) *Parker v. Harvey*, 11 Vin. Abr. 292; 2 Eq. Cas. Abr. 460.

(v) Co. Litt. 209 a., 209 b.; 1 P. W. 721; *Crossing v. Honor*, 1 Vern. 180; *Lloyd v. Thursby*, 9 Mod. 463.

(w) *Gifford v. Manley*, Cas. T. Talb. 109; *Brown v. Vawser*, 4 East. 584.

(x) *Gifford v. Manley*, Cas. T. Talb. 109.

(y) 2 Bl. Com. 465, 466, 511; *Williams v. Lucas*, 2 Cox, 160, 1 P. W. 5th ed. 430, n. It may here be mentioned, that if a person frame an instrument in a way, so that it may be taken to be either a promissory note or a bill of exchange, the holder is at liberty

to treat it either as the one or the other. *Edis v. Bury*, 9 Dowl. & Ry. 492.

(z) *Want v. Swayne*, Willes, 185.

(a) *Walker v. Witter*, Dougl. 1, 5; *Atkinson v. Lord Braybrooke*, 4 Campb. 380, 1 Stark. 219.

(b) *Hooper v. Eyles*, 2 Vern. 3rd ed. 480, and n. (2); *Anon.* 11 Vin. Abr. 271, pl. 11; *Lord Townsend v. Windham*, 2 Ves. 1, 4, 7; *Goodman v. Purcell*, 2 Anstr. 548; *Stewart v. Noble*, 1 Vern. & Scriv. 536; *Alexander v. Holland*, 2 Kenyon, pt. ii. 4.

(c) *Borret v. Goodere*, 1 Dick. 428; where Lord Camden said, "Indeed, if the account had consisted of particulars, some whereof had been specialty, and some simple contract, yet the balance found due would be a simple contract debt." See also on a balance debt, *Ex parte Hooper*, 1 Mer. 7, 9.

(d) *Dupleix v. De Rozen*, 2 Vern. 540.

(e) *Charlton v. Low*, 3 P. W. 328; *Pollifex v. Moore*, 3 Atk. 272. See also *Bathurst's case*, 2 Vent. 40.

covenanted that he would not obstruct such disposition, and after the marriage the money was given up by the trustee, and came into the hands of the husband, who died, the wife was not, by means of the covenant, or otherwise, a specialty creditor of the husband: *(f)* and that where, to secure a sum of money, principal and surety jointly enter into a bond, and there is no mortgage to the creditor, or counter bond to the surety, or other assurance which can make the surety a specialty creditor of the principal, and the money on the bond is due in the life time of the principal, the surety is, after the death of the principal, a creditor by simple contract only against his assets, if after the money was due he paid off the bond in the life time of the principal, or after his death; *(g)* and that in a case where the plaintiff had joined as surety with the testator in a joint and several bond, and, after the death of the testator, had paid the amount of the bond to the obligee, taking an assignment of the bond; the plaintiff was not a specialty creditor of the testator. *(h)*

SECTION II.

DEBT SECURED BY MORTGAGE.

WHEN money is secured by a mortgage of land, as freehold, copyhold, or leasehold, the premises mortgaged are a pledge for a debt; *(i)* and a [*6] debt exists, although there is no other security, *as a bond or covenant, for payment of the money. *(j)* If, besides the mortgage, the mortgagor enters into a contract under seal, as a bond or covenant to pay the money, the debt is one by special contract or specialty. *(k)* If there is no such farther security, the debt is by simple contract only. *(l)*

The debt appears to be of the latter kind, when money is secured by an equitable mortgage, made by a written but unsealed agreement to mortgage; *(m)* or by a deposit of title deeds, accompanied or not accompanied by such an agreement. *(n)*

That an unwritten agreement to mortgage, accompanied by a deposit

(f) *Lench v. Lench*, 10 Ves. 511, 515, 521.

(g) *Copis v. Middleton*, 1 Turn. & R. 224, cited 4 Russ. 278.

(h) *Jones v. Davids*, 4 Russ. 277.

(i) 2 P. W. 438; 1 Atk. 487; 2 Atk. 435, 437, 445; 3 Ves. 131; 7 Ves. 336, 340; Dan. Rep. 336.

(j) 2 Salk. 449; 1 P. W. 294, 295; 2 P. W. 455; 3 P. W. 360; Prec. Ch. 61; Jacob Rep. 239; *Lloyd v. Thursby*, 9 Mod. 463.

(k) *Galton v. Hancock*, 2 Atk. 424, 435, 436; *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 466; *Aldrich v. Cooper*, 8 Ves. 394, *Gifford v. Manley*, Cas. T. Talb. 109.

(l) *Thomas v. Terrey*, 1 Eq. Cas. Abr. 139; *Gilb. Eq. Rep.* 110; *Lloyd v. Thursby*,

9 Mod. 463, and stated from M. S. 2 Cruise Dig. 2nd ed. 168; *Waring v. Ward*, 7 Ves. 332, 336.—1 Bro. C. C. 464; 8 Ves. 394; Jacob Rep. 239.

(m) That this agreement is a mortgage in equity, see *Shepherd v. Kent*, Prec. Ch. 190, Sir Simeon Stuart's case, or *Stuart v. Tichborne*, cited 3 Ves. 576, 582, 2 Sch. & Lef. 383; *Ex parte Wills*, 2 Cox, 233; and *Ex parte Hodgson*, 1 Glyn & J. 12.

(n) On an unsealed written agreement to mortgage, accompanied by a deposit of title deeds, see *Ex parte Wetherell*, 11 Ves. 398; *Ex p. Coombe*, 11 Ves. 369; *Ex p. Kensington*, 2 Ves. & B. 79; *Ex p. Coombe in re Beavan*, 4 Madd. 249; and *Ex p. Alexander*, 1 Glyn & J. 409.

of title deeds with the creditor or his agent, may in equity constitute a mortgage, was, after the Statute of Frauds, first decided in *Russell v. Russell*, where Lord Thurlow affirmed a decision by the Lords Commissioners, Lord Loughborough and Mr. Justice Ashhurst. (o) The deposit lots in parol (p) evidence of the intent *with which the deposit was made. (q) And if this evidence proves an agreement [*7] to create by the deposit a present lien on the land, and to execute hereafter a legal mortgage, a Court of Equity will fulfil this intention, and holds that the agreement and deposit do in equity bind, or are a lien on, the land now, and constitute a present equitable mortgage. (r) This doctrine plainly thwarts the object of the third section of the Statute of Frauds; by which section it is enacted, "That no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of, any messuages, manors, lands, tenements, or hereditaments, shall at [*8] any *time after the four and twentieth day of June, 1677, be

(o) *Russell v. Russell*, 1 Bro. C. C. 269; cited 9 Ves. 117, 19 Ves. 479, and 2 Sch. & Lef. 383. See *Brander v. Boles or Robs*, Prec. Ch. 376; Gilb. Eq. Rep. 35. See likewise *Fitzjames v. Fitzjames*, Cas. T. Finch, 10, where, before the Statute of Frauds, a deed was deposited for securing a debt, and the creditor was allowed to retain it until payment. And see farther *Brizick v. Manners*, 9 Mod. 284, cited 12 Ves. 199.

(p) It may here be remarked, that although the word "*parol*," popularly or generally speaking, means *verbal* or *unwritten*, yet it is sometimes used in the sense of *written*. "All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as contracts in writing. If they be merely written, and not specialties, they are parol." (*Ram v. Hughes*, 7 Durn. & E. 360, n.) A lease for years written, but not under seal, is a parol lease (*Ibid.*) A lease unwritten, and made verbally only, is a parol lease (Statute of Frauds, 29 C. II. c. 3, s. 1, 2; 2 Bl. Com. 297.) Unwritten or verbal evidence, delivered in words spoken by a witness, is called parol evidence (3 Bl. Com. 369; 12 Ves. 197.) To protect certain assurances of land from the fraud and perjury to which they are exposed, when they are made without writing, and they let in verbal or parol evidence to explain them, was the object of the third section of the Statute of Frauds (12 Ves. 197; 19 Ves. 211; 1 Ross, 300.) Verbal evidence offered in explanation of a will is parol evidence (*Lord Falkland v. Bertie*, 2 Vern. 337, 339; *Ulrich v. Litchfield*, 3 Atk. 373.) But written evidence offered for the same purpose, and consisting of documents, sealed or unsealed, as deeds, letters, entries, rentals, or papers of any kind, although it may be "in a sense parol" (*Druce v. Denison*, 6 Ves. 397,) and be

sometimes so called (4 M. & S. 556,) seems to be most properly denominated, not parol, but extrinsic or collateral evidence (*Doe v. Brown*, 11 East, 441; *Doe v. Lyford*, 4 M. & S. 550.) As evidence, which is parol, in the sense of verbal, and is offered to explain an instrument, is certainly extrinsic evidence, so this latter comprehensive expression is sometimes used to denote it (*Colpoys v. Colpoys*, Jacob, 451.) "Pleadings," says Sir W. Blackstone, "are the mutual altercations between the plaintiff and defendant; which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel, *ore tenus*, or *viva voce*, in court, and then minuted down by the chief clerks, or prothonotaries; whence in our old law French, the pleadings are frequently denominated the *parol*." (3 Bl. Com. 293; 3 Reeves' Hist. 95, 427. See also the statute 36 Edw. III. c. 15, which changed the language of pleading from French to English.) At this day pleadings, although now in writing, retain, in one instance at least, the name of the *parol*. For when in an action or suit the plaintiff or defendant is an infant, in many cases "either party may suggest the nonage of the infant, and pray that the proceedings may be deferred till his full age; or (in the legal phrase) that the infant may have his age, and that the *parol* may *demur*, that is, that the pleadings may be staid; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby." (3 Bl. Com. 300; 2 Inst. 257, 291; Finch L. 79, 80, ed. 1759, 245, 246; Markal's case, 6 Co. 3; *Plasket v. Beeby*, 4 East, 485, 1 Smith, 264; *Lechmere v. Brasier*, 2 J. & W. 287.)

(q) 1 Cox, 212; 12 Ves. 197; 2 Sch. & Lef. 383.

(r) 1 Cox, 212; 19 Ves. 211; 1 Buck, 526.

assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."^(s) Lord Thurlow's decision in *Russell v. Russell* was confirmed by himself, by the like determination in other cases;^(t) and these authorities have been followed, although with much reluctance, by other judges, in a great number of instances;^(u) many of them in bankruptcy,^(v) on the mortgagee's petition for payment out of the estate so pledged to him by the bankrupt;^(w) and where the deposit was of a lease, which contained a clause against assignment without license.^(x) And the doctrine of *Russell v. Russell*, although in effect it repeals the Statute of Frauds, is now too firmly established to be shaken by the Courts.^(y) It has even been followed in a Court of Law. In *Richards v. Borrett*, Lord Kenyon observed:—It had been held in Equity, that depositing all, or even part of, the deeds respecting real property, implied an intention of charging the real estates, and gave the party a lien upon them; and that as this was an equitable action, he would hold the [*9] same doctrine.^(z) *In *Doe v. Hawke*, where a lease for years was devised by a conditional limitation, the estate of the devisee was held to be determined by certain acts done by him, and one of these acts was a deposit of the lease, by way of security for money borrowed.^(a)

The mere deposit of title deeds, at the time when a debt is contracted or money advanced, is itself evidence of an agreement to pledge the land for security of the money; and, unless rebutted by other evidence,^(b) is alone sufficient to establish a present equitable mortgage.^(c) And with greater reason a present mortgage is effected, if the evidence offered to explain the deposit proves an express agreement to mortgage.^(d) It is, perhaps, not decided that a mere deposit of deeds, unaided by parol evidence, will constitute a mortgage to secure a debt antecedently due.^(e) But it is clear that parol evidence of the agreement, entered into when

(s) Stat. 29 C. II. c. 3. s. 3; 1 Cox, 321; 9 Ves. 117; 11 Ves. 403; 12 Ves. 197; 14 Ves. 607; 19 Ves. 211; 1 Rose, 300. See also the fourth section of the same statute.

(t) *Featherstone v. Fenwick*, and *Hurford v. Carpenter*, 1 Bro. C. C. 270, n.

(u) *Plumb v. Fluit*, 2 Anstr. 438; *Birch v. Ellames*, *ibid.* 427; *Lucas v. Commerford*, 3 Bro. C. C. 166, 1 Ves. jun. 236, cited 6 Price, 460, 461; *Hiern v. Mill*, 13 Ves. 114; *Hawkins v. Ramsbottom*, 1 Price, 138; *Casberd v. Att. Gen.* 6 Price, 411, Dan. 238; *Wiseman v. Westland*, 1 Y. & J. 117. See also *Hankey v. Vernon*, 3 Cox, 12, and *Williams v. Medicott*, 6 Price, 495.

(v) *Ex parte Haigh*, 11 Ves. 403; *Ex p. Price*, 1 Buck, 221, 3 Madd. 132; *Ex p. Wise*, 1 Mont. & M. 65. See *Doe v. Roe*, 5 Espin. 105.

(w) *Ex parte Mountfort*, 14 Ves. 606; *Ex p. Whitbread*, 19 Ves. 209, 1 Rose, 299; *Ex p. Coombe*, 4 Madd. 249; *Ex p. Meux*, 1 Glyn & J. 116.

(x) *Ex parte Baglehole*, 1 Rose, 432; *Ex*

p. Sherman, 1 Buck, 462; *Ex p. Abdy*, 2 Christ. B. L. 2nd ed. 120. See also *Doe v. Bevan*, 3 M. & S. 353. In *Doe v. Hogg*, 1 Carr. & P. 160, a deposit of a lease, as security for money borrowed, was held not to create a forfeiture, under the terms of the proviso for re-entry contained in the lease.

(y) 1 Cox, 312; 9 Ves. 117; 12 Ves. 198; 19 Ves. 212, 479; 1 Mer. 9; 2 Ves. & B. 83.

(z) 3 Espin. Rep. 102. See also *Wood v. Grimwood*, 10 B. & C. 679, and *Sumpter v. Cooper*, 3 Barn. & Adolph. 223.

(a) 2 East, 481.

(b) 11 Ves. 401, 14 Ves. 607; *Lucas v. Dorrien*, 7 Taunt. 278, 1 J. B. Moore, 29.

(c) 11 Ves. 401, 403; 12 Ves. 198; 17 Ves. 230, 231; 19 Ves. 258; 2 Ves. & B. 83; 1 Turn. & R. 279; 1 Glyn & J. 242; 3 Y. & J. 161; *Featherstone v. Fenwick*, and *Hurford v. Carpenter*, 1 Bro. C. C. 270, n., cited 14 Ves. 607; *Ex parte Bruce*, 1 Rose, 374.

(d) *Ex parte Bruce*, 1 Rose, 374.

(e) See 12 Ves. 198; 14 Ves. 607.

the deposit takes place, may make that agreement and deposit an equitable mortgage to secure such a debt;(f) or such a debt, or money advanced when the deposit takes place, and also future advances of money;(g) or, as the case may be, future advances only.(h)

In *Ex parte Langston*, a mortgage effected by an unwritten agreement and deposit of title deeds, and made to secure an antecedent debt, was allowed to cover money advanced after the deposit, on parol evidence that it was advanced on the faith of this extension of the existing mortgage.(i) This decision has been followed in other cases.(j) And it is certain that the land *will be a pledge for the subsequent advance also, if when this loan takes place the deeds are re- [*10] delivered to the debtor, and by him are then again put into the hands of the creditor, on a verbal agreement to include this money also in the mortgage.(k) It is likewise clear that when, after the mortgage, the firm of the creditors is altered, the benefit of the existing mortgage may be extended to the new firm, on parol evidence that, after the change of the partners, it was agreed the mortgage should be a security to the new house.(l)

From a dislike of the doctrine of equitable mortgage, by an unwritten agreement and a deposit of title deeds, the Courts eagerly seize on any circumstance, which may enable them to take a particular case out of the effect of it.(m) And, accordingly, several cases are found, in which the circumstances have been held not to create such a mortgage.(n) In one of them the deposit was made with the wife of the debtor:(o) in another, all the title deeds, except the immediate conveyance in fee to the debtor, were sent to the creditor, to enable him to have a mortgage prepared; and it was not the intention of the creditor that he should have a mortgage, till an actual one was executed to him; and, in the same case, the conveyance in fee to the debtor was deposited with another creditor, as a security, with a promise to send him the other title deeds, but he was not to have an equitable mortgage, till he got possession of the whole of the deeds:(p) and in a third case, where the creditor claimed to be mortgagee for money due previously to the deposit, it was proved the deposit was made, not to secure money before or at the time advanced, but for the purpose of obtaining future credit.(q)

*In *Ex parte Bulteel*, Lord Thurlow seems to have drawn [*11] a distinction between a deposit of title deeds, accompanied

(f) *Edge v. Worthington*, 1 Cox, 211; *Ex parte Haigh*, 11 Ves. 403; *Ex p. Langston*, 17 Ves. 227, 1 Rose, 26; *Ex p. Whitbread*, 19 Ves. 209, 1 Rose, 299; *Hockley v. Bantock*, 1 Russ. 141, 144.

(g) *Ex parte Haigh*, 11 Ves. 403; *Ex p. Mountfort*, 14 Ves. 606; *Ex p. Warner*, 19 Ves. 202, 1 Rose, 286; *Ex p. Whitbread*, 19 Ves. 210, 1 Rose, 299; *Ex p. Lloyd*, 1 Glyn & J. 389.

(h) *Ex parte Mountfort*, 14 Ves. 606.

(i) 17 Ves. 227, 1 Rose, 26, cited 16 Ves. 479, and 1 Mer. 9.

(j) *Ex parte Whitbread*, 19 Ves. 209, 1 Rose, 299; *Ex p. Lloyd*, 1 Glyn & J. 389. 2 Ves. & B. 83, 84.

(k) 19 Ves. 210, 479; 2 Ves. & B. 84.

(l) *Ex parte Kensington*, 2 Ves. & B. 79, 84; *Ex p. Lloyd*, 1 Glyn & J. 389.

(m) *Ex parte Hooper*, 1 Mer. 9, 10; 19 Ves. 480; *Bozon v. Williams*, 3 Y. & J. 150, 161.

(n) *Ex parte Finden*, 11 Ves. 404, n.; *Ex p. Coombe*, 17 Ves. 369; *Ex p. Whitbread*, 19 Ves. 209, 1 Rose, 299; *Ex p. Coombe, in re Beavan*, 4 Madd. 249.

(o) *Ex parte Coming*, 9 Ves. 115.

(p) *Ex parte Pearce*, 1 Buck. 525. See also on a deposit of part only of title deeds, *Ex p. Wetherell*, 11 Ves. 398, and *Wiseman v. Westland*, 1 Y. & J. 117. See likewise *Fitzjames v. Fitzjames*, Cas. T. Finch, 10,—a case before the Statute of Frauds.

(q) *Mountfort v. Scott*, 1 Turn. & R. 274, 3 Madd. 34.

by an agreement to bind the land now, and an agreement to mortgage, accompanied by a deposit made for the purpose to enable the creditor to have the legal mortgage prepared. The latter agreement and deposit he appears to have held did not amount to a present pledge of the land, but only to an agreement to pledge the land hereafter, namely, from the time when the legal mortgage should be executed, and therefore did not constitute a present equitable mortgage.^(r) The same distinction was taken, and the like decision made, by Sir W. Grant in *Norris v. Wilkinson*.^(s) On the other hand, an agreement to mortgage, and a deposit of title deeds for the purpose to enable the creditor to have the mortgage prepared, have been held to be a present equitable mortgage, by Sir L. Kenyon in *Edge v. Worthington*,^(t) and by Lord Eldon in *Ex parte Bruce*.^(u) It is observable that it does not appear that *Edge v. Worthington* was cited before Lord Thurlow, or that Sir W. Grant, or Lord Eldon, was aware of the decisions before made on the same point. In the absence of any farther case, the law to be extracted from the conflicting opinions mentioned, would perhaps rest on this question;—when on a deposit of title deeds there is proof of a verbal agreement to mortgage, do this agreement and deposit create a present lien on the land, in a case where the time from which the land shall be bound is not expressly mentioned? There is, however, an additional authority, wherein, of the four cases named, *Ex parte Bulteel* alone appears not to have been noticed. This authority is *Hockley v. Bantock*, where Lord Gifford decided that the agreement to mortgage, accompanied by a delivery of the title deeds to the creditor's agents, in order that a mortgage deed might be prepared, constituted a present equitable mortgage;^(v) a decision which adds great weight to the cases before Sir L. Kenyon and Lord Eldon, and has probably settled the law on the subject.

[*12] *A deposit by a copyholder of the copies of the Court Rolls, coupled with evidence of a verbal agreement to create a lien on the land, is not distinguishable from the like deposit in the case of freeholds, and is therefore in equity a mortgage.^(w)

SECTION III.

DEBT CONTRACTED BY A BREACH OF TRUST.

A BREACH of trust may make the trustee a debtor to his *cestui que trust*. And the debt will in some cases be one by specialty. It may be a specialty debt, if the breach of trust consists of the non-fulfilment of a contract entered into by the trustee under his hand and seal, or by

(r) 12 Cox, 243.

(s) 12 Ves. 192, cited 6 Price, 459. See also *Brander v. Boles*, Prec. Ch. 375, Gilb. Eq. Rep. 35, and the *King v. Benson*, cited 6 Price, 467—473, and Dan. Rep. 250.

(t) 1 Cox, 211.

(u) 1 Rose, 374.

(v) 1 Russ. 141, 144.

(w) *Ex parte Warner*, 1 Rose, 286; 19 Ves. 202; *Winter v. Lord Anson*, 3 Russ. 493. See *Eden's Bank* L. 2d ed. 291, n.; where, on citing *Ex p. Warner*, the author adds, "*Sed qu.* I have been informed by the Deputy-Secretary of Bankrupts, that the contrary has been decided by the Vice-Chancellor, in *Ex p. Corrie*, re *Green*, 12th August, 1825."

deed.(x) But, expect in some cases of a special contract, a breach of trust, generally speaking, creates a debt by simple contract only.(y)

*CHAPTER II.

[*13]

CROWN DEBTS.

SECTION I.

A PREROGATIVE of the Crown entitles the king to a particular process for the recovery of his debts; and in many instances to be paid in preference to a subject, who is a creditor of the same debtor, and who, if the like circumstances lay between subject and subject, would not be liable to the same postponement. A reason assigned for this prerogative is, that *Thesaurus Regis est pacis vinculum et bellorum nervi*;(x) a reason that in modern times is better expressed by the comprehensive term, public good.(a) The prerogative mentioned offers a wide field for research into, and investigation of, much law that originated, and became established, in this country at a distant period; and which, modified and illustrated by successive acts of the legislature, and numerous decisions and opinions delivered in the courts of justice, is come down to the present time, and now constitutes a very material part of the law of the land. In this place, however, where the right of the Crown to be paid, and often to be first paid, out of the assets of a person deceased, is the single object that claims direct attention, it is proper to leave unattempted a minute examination of the general subject; and if any departure from the main object of inquiry may here be allowed, to confine that digression to the more prominent parts of the law of crown debts.

A prerogative of the king in the case of debts due to him may undoubtedly claim a foundation in the common law.(b) By this law, before the reign of Henry III., the king was entitled to *execution [*14] of the body, and goods, and possession of land, of his debtor;(c) a remedy which, so far as relates to the possession of land, was not enjoyed by a subject until it was granted to him by the Statute West-

(x) Gifford v. Manley, Cas. T. Talb. 109. See, nevertheless, Baily v. Ekins, 2 Dick. 632.

(y) Gifford v. Manley, Cas. T. Talb. 110; Cox v. Bateman, 2 Ves. 19; Vernon v. Vawdry, 2 Atk. 119, Barn. Ch. Rep. 280, 304; Baily v. Ekins, 2 Dick. 632; Kernan v. Fitz-Simon, 3 Ridgew. P. C. 1, 18. See also Bartlett v. Hodgson, 1 Durn. & E. 42, and Lord Townshend v. Windham, 2 Ves. 4, 7. And on the liability of the assets of trustees to make good a breach of trust by them, see farther Scurfield v. Howes, 3 Bro. C. C. 90;

Long v. Stewart, 5 Ves. 800, n.; Lord Montford v. Lord Cadogan, 17 Ves. 485, 19 Ves. 635, 2 Mer. 3; Walker v. Symonds, 3 Swanst. 1; and Adair v. Shaw, 1 Sch. & Lef. 272.

(x) 3 Co. 12 b.; 11 Co. 91 b.; Co. Litt. 131 b.; Godb. 293; Parker Rep. 99.

(a) 4 Durn. & E. 410.

(b) 3 Co. 12 b.; Parker Rep. 99; 3 Bl. Com. 419.

(c) 2 Inst. 19; 3 Co. 12 b.; 7 Co. 21 b.; 2 Rol. Abr. 158, H. 4; Godb. 290; Com. 437; 2 Barn. & Ald. 610, 612; 3 Bl. Com. 419.

minster 11, 13 Edward I. c. 18, which first provided for him the writ of *elegit*.^(d)

Every one, who holds in his hands money that belongs to the crown, is a crown debtor, and subject to the process of the crown.^(e)

So soon as by inquisition a person is found indebted to the crown by simple contract, such debt becomes a debt of record.^(f)

A person, who gives to the crown a bond on condition, is not a bond debtor of the crown before breach of the condition.^(g)

The farther consideration of the law of crown debts may here be prosecuted under the following heads:—

SECT. II. *Of certain Enactments in the Statutes 33 Henry VIII. c. 39, and 13 Elizabeth, c. 4.*

III. *Of Lien and Sale by the Debtor.*

IV. *Of Lien, and Debtor's Mortgage by deposit of Title Deeds.*

V. *Of an Extent; in chief, and in aid.*

VI. *Of a Sale under an extent.*

VII. *Of certain Titles preferred to the lien of the Crown.*

VIII. *Of particular instances of Fraud against the Crown.*

IX. *Of the Debts of a Crown Debtor deceased.*

The reader, who may desire to pursue some additional branches of this law, will find in the late Reports several cases concerning, amongst [*15] other matters,^(h) the affidavit on which to ground an *extent;⁽ⁱ⁾ the right of a stranger to attend the inquisition on an extent, and, for the purpose of saving his property from seizure, to assert his claim to it, and support it by evidence;^(j) the right of the crown, on an extent in chief or in aid, to seize goods, by a subject taken in execution under a writ of *fi. fa.*;^(k) the Statute of Limitation, 21 James I. c. 16;^(l) partnership property;^(m) wharfinger's lien;⁽ⁿ⁾ prin-

(d) 2 Inst. 394; 3 Co. 12, 13 b.; 3 Bl. Com. 418.

(e) Parker Rep. 98; 6 Price, 476; 9 Price, 656; Dan. Rep. 256; 1 Tyrwh. Rep. 384; 1 Cr. & Jerv. 408.

(f) Parker Rep. 98; 2 Price, 15; 6 Price, 474; Dan. Rep. 255.

(g) The King v. Tarleton, 9 Price, 647, 1 M'Clel. & Y. 250, n. See The King v. Marsh, M'Clel. Rep. 688.

(h) The King v. Williams, M'Clel. 67; The King v. Winkles, 1 M'Clel. & Y. 33; The King v. Marsh, ib. 250; The King v. Cumming, ib. 266; The King v. Slee, ib. 361; The King v. Soulby, 1 Y. & J. 249; The King v. Burns, ib. 579; The King v. Tregoning, 2 Y. & J. 132; Attorney General v. Gibbs, 3 Y. & J. 333; The King v. Jones, 1 Cr. & Jerv. 140; The King v. Wrangham, 1 Tyrwh. 383, 1 Cr. & Jerv. 408.

(i) The King v. Mainwaring, 1 Price, 202; ex parte Hippealey, 2 Price, 379; The

King (in aid of Horn) v. Rippon, ib. 398; The King (in aid of Stuckey) v. Gibbs, 7 Price, 633; The King (in aid of Lechmere) v. Dineley, 9 Price, 311; The King (in aid of Hill) v. Hornblower, 11 Price, 29; The King v. Bell, ib. 772; The King v. Estate of G. Hassell, 13 Price, 279, M'Clel. 105; The King v. Marsh, 13 Price, 826, M'Clel. 688.

(j) The King v. Bickley, 3 Price, 454.

(k) The King v. Sloper, 6 Price, 114; The King (in aid of Pattison) v. Sloper, ib. 144; The King v. Giles, 8 Price, 293; Swain v. Morland, Gow N. F. Rep. 39, 1 Brod. & B. 370, 3 J. B. Moore, 740; Giles v. Grover, 1 Y. & J. 232.

(l) The King v. Morrall, 6 Price, 24, cited 4 B. & C. 151.

(m) The King v. Sanderson, Wightw. 50; The King v. Rock, 2 Price, 198.

(n) The King v. Humphery, 1 M'Clel. & Y. 173.

cipal and surety;(o) sheriff's poundage;(p) landlord's claim for rent against his tenant's property seized.(q)

SECTION II.

OF CERTAIN ENACTMENTS IN STATUTES 33 HENRY VIII. C. 39, AND 13 ELIZABETH, C. 4.

AN important statute relating to crown debts is the 33 Henry VIII. c. 39.(r) It is enacted,

By section 50, That obligations to the king shall be of the same nature, force, and effect, as the writings obligatory, [316] taken and knowledged according to the Statute of the Staple at Westminster, hath [have] been taken, used, and executed, against any lay person.

By section 74, That if any suit be commenced, or any process be awarded for the king, for the recovery of any of the king's debts, that then the same suit and process shall be preferred before the suit of any person. And that the king shall have first execution against any defendant before any other person; so always that the king's suit be commenced, or process awarded for the debt at the suit of the king, before judgment given for the said other person.

By section 75, That all manors, lands, tenements, and hereditaments, in the seisin of any person, to whom the same manors, &c., shall descend, revert, or remain in fee simple, or in fee tail, general or special, by, from, or after the death of any his ancestor as heir, or by gift of his ancestor, whose heir he is, which said ancestor shall be indebted to the king by judgment, recognizance, obligation, or other specialty, the debt whereof shall not be paid; that then the same manors, &c., shall be and stand charged and chargeable to and for the payment of the same debt.

By section 76, That the king shall not be barred to demand and receive his debts against any of his subjects, as heir to any person indebted to the king, albeit this word heir be not in such recognizance, obligation, or specialty; or that any such person or persons shall allege that he or they have not any manors, &c., to them descended, but only such manors, &c., as be entailed or given to them by any their ancestors to whom they be heirs.

By section 77, That the king may at his pleasure demand and recover his debts of and against any executor or executors, administrator or ad-

(o) *The King v. Estate of G. Hassell*, M'Clel. 105; *Attorney General v. Atkinson*, 1 Y. & J. 307.

(p) *The King v. Villers*, Wightw. 95; *The King v. Bowles*, ib. 116; *Stevens v. Rothwell*, 3 Brod. and B. 143.

(q) *The King v. De Caux*, 2 Price, 17; *Ex parte Taunton*, in *The King v. Hodder*, 4 Price, 313; *The King* (in aid of Mytton) v. Hill, 6 Price, 19.

(r) See generally on the interpretation of

this act, *Cecil's case*, 7 Co. 18 b.; *Lord Anderson's case*, 7 Co. 21; *Foskew's case*, 3 Leon. 90; *Trallop's case*, Lane, 51; *Anon. Jenk. Cent. c. 5, Ca. 89*; *Attorney General v. Andrew*, Hardr. 23; *Attorney General v. Stonehouse*, ib. 339; *Savile and the Queen-Mother*, ib. 503; *Anon. Savile*, 10, Ca. 35; *Anon. ib. 12, Ca. 33*; *The King v. Lambe*, M'Clel. Rep. 402, 13 Price, 649; *The King v. Bell*, and *The King v. Shackie*, 11 Price, 772, 783.

ministrators, of any such person indebted in manner above said, if the same executor or executors, administrator or administrators, shall have assets in his or their hands, in deed or in law.

By section 80, That if any manors, &c., shall be charged or chargeable [*17] with the debt of the king, and shall be in the seisin of *divers and sundry persons, other than the obligor or obligors, that then all and singular the said manors, &c., and every parcel of them, shall be wholly and entirely, and in no wise severally, liable and chargeable to and with the payment of the said debt.

The chief effects of giving to a bond the force of a statute staple seem to be, to make the debt a debt of record, and to empower the Crown to seize the whole, and not, as in the case of an *elegit*, a moiety only of the debtor's land.(s)

On a Crown debt due by a tenant in tail, it was, in Lord Anderson's case, resolved:—

1. That before the Statute 33 Henry VIII., if tenant in tail of land became indebted to the king by judgments recognizance, obligation, or otherwise, and died, the king should not extend the land in the seisin of the issue in tail.

2. That if tenant in tail becomes indebted to the king by the receipt of the king's money, or otherwise, unless it be by judgment, recognizance, obligation, or other specialty, and dies, the land in the seisin of the issue in tail, by force of the said Act 33 Henry VIII., shall not be extended for such debt of the king; for the statute extends only to the said four cases, and all other debts remain at common law.

3. That if tenant in tail becomes indebted to the king by one of the four ways mentioned in the said Act, and dies, and, before any process or extent, the issue in tail *bond fide* aliens the land in tail, that now this land shall not be extended by force of the said Act 33 Henry VIII.; for, as it appears by the words, it makes the land, in the possession or seisin of the heir in tail, only liable against the issue in tail, and not the alienee.(t)

Another material statute, relating to Crown debts, is the 13 Elizabeth, c. 4.(u) This, amongst other clauses, names certain [*18] *accountants of the Crown, and renders their land liable to their debts, although they are not bound to the Crown in any obligation. "For the better security," it states, "of the Queen's Majesty, her heirs and successors, against such as shall have the receipt and charge of money and treasure of her Highness, her heirs and successors; Be it enacted, that all lands, tenements, profits, commodities, and hereditaments, which, any—treasurer or receiver in or belonging to any of the Queen's Majesty's Courts of the Exchequer, wards and liveries, or duchy of Lancaster, treasurer of the chamber, cofferer of the household to the Queen's Majesty, her heirs or successors, treasurer for the wars, treasurer of any

(s) Stat. 13 Edw. I. stat. 3, c. 1; stat. 27 Edw. III. stat. 2, c. 9; 2 Bl. Com. 160, 161, 466; Shep. Touch. 353. Of execution under a statute staple, see 8 Price Rep. 316, and Shep. Touch. 356.

(t) 7 Co. 21.

(u) See generally on the construction of this statute, Sir Christopher Hatton's case,

stated 10 Co. 55 b.; case of the Queen, Coxhead, and Bishop of Sarum, Mo. 126; Anon. Jenk. Cent. c. 5, ca. 89; Attorney General v. Alston, 2 Mod. 247; Nicholls v. How, 3 Vern. 389; Wilde v. Fort, 4 Taunt. 334; Casberd v. Ward and Attorney General, 6 Price, 411, Dan. 238.

fort, town, or castle, where any garrison is or shall be kept, treasurer of the Admiralty or navy, treasurer, under-treasurer, or other person accountable to the Queen's Majesty, her heirs or successors, for any office or charge of or within the Mint; treasurer or receiver of any sums of money imprest,(v) or otherwise, for the use of the Queen's Majesty, her heirs or successors; or for provisions of victual, or for fortifications, buildings, or works; or for any other provisions to be used in any of the offices of the Queen's Majesty's ordinance and artillery, armoury, ward-robes, tents and pavilions, or revels, customer, collector, farmer of customs, subsidies, imposts, or other duties, within any port of the realm; collector of the tenths of the clergy, collector of any subsidy or fifteen, receiver-general of the revenues of any county or counties, answerable in the receipt of the Exchequer, or in the court of wards and liveries, or the duchy of Lancaster, clerk of the hamper,—now hath, or at any time hereafter shall have, within the time which he or they, or any of them, shall remain accountable; shall, for the payment and satisfaction unto the Queen's Majesty, her heirs and successors, of his or their arrearages, at any time hereafter to be lawfully, according to the laws of the realm, adjudged and determined upon his or their account (all his due and reasonable petitions being allowed,) be liable to the payment thereof, and be put and had in execution, for the payment *of [*19] such arrearages or debts, to be so adjudged and determined, upon any such treasurer, receiver, teller, customer, collector, farmer, officer, or accomptant, as is before named, in like and in as large and beneficial manner, to all intents and purposes, as if the same treasurer, receiver, teller, customer, farmer, or collector, upon whom any such arrearages or debts shall be so adjudged or determined, had, the day he became first officer or accomptant, stood bound by writing obligatory, having the effect of a statute of the staple, to her Majesty, her heirs or successors, for the true answering and payment of the same arrearages or debts."

SECTION III.

OF LIEN, AND SALE BY THE DEBTOR.

WHEN a person is indebted to the Crown by bond, and in his lifetime an extent in chief is issued, his goods and chattels, including a term of or leaseholds for years,(w) are bound, from and including the day on which the extent is taken out; in other words, from the *teste* of the writ.(x)

The nature of the lien of a Crown debt on land of inheritance seems to be different in different cases. To many intents, probably, the lien begins from the time when the debtor becomes indebted to the Crown by simple contract, or executes a bond to the Crown, or becomes an accountant within the statute 13 Eliz. c. 4.

(v) On the term "Imprest," used in the Parker Rep. 108; The King v. Lambe, Treasury Warrants, and other Government M' Clel. Rep. 422.
documents, see 6 Price Rep. 424, n.

(x) The King v. Cotton, Parker Rep. 112, 123, 125, 127, 2 Ves. 288, 295.

Against a purchaser for valuable consideration, and without fraud, and without notice of the debt, or that the vendor holds an office known to the public to be an accountable office, a bond debt appears to be a lien from the time the debtor executed the bond.(y) And against a purchaser for valuable consideration, and without fraud, and without notice of the debt, or that the vendor is an accountant within the statute 13 Eliz. c. 4, a Crown *debt is a lien from the time the debtor became [*20] an accountant within that statute.(z) But against a purchaser for valuable consideration, and without fraud, and without notice of the debt, a lien is not created by a simple contract debt owing to the Crown by a vendor, who does not hold an office known to the public to be an accountable office.(a) If the vendor does hold such an office, and which is not within the statute 13 Eliz. c. 4, then his simple contract debt is perhaps a lien, if the purchaser has notice that the vendor holds that office:(b) and it seems not to be a lien if the purchaser is unacquainted with this fact.(c) And it is presumed to be perfectly clear, that so soon as a simple contract debt is by inquisition made a debt of record, from that time at least a lien is created against a purchaser for valuable consideration, and without fraud, and without notice of the debt, or that the vendor holds an office known to the public to be an accountable office.(d)

When a Crown debt is a lien on land, it is a lien on the debtor's freehold(e) land, but not on his copyholds held at the will of the lord.(f) In the case of freehold land, the Crown may extend a legal or trust(g) estate, or an equity of redemption.(h) And if an accountant within the statute 13 Eliz. c. 4, before he became such accountant, by a voluntary settlement settled land to the use of himself for life, remainders over, remainder to his daughter in fee, with power to himself of revocation; the effect of this power is to render the fee simple liable, both before and after his death, to his Crown debt incurred after such settlement made by him.(i)

[*21] *On the subject of a sale by the debtor, the law applies,

1. *To a Sale of Leaseholds for years.*
2. *To a Sale of Freehold Land of Inheritance.*
3. *To an attendant Term.*

1. When a person, indebted to the Crown by bond, is possessed of a

(y) Stat. 33 H. VIII. c. 39; 3 Co. 12; Shep. Touch. 359, 361.

(z) Stat. 13 Eliz. c. 4; Sir Edward Coke's case, Godb. 289, cited Hardr. 24; Sir Christopher Hatton's case, stated 10 Co. 55 b.; case of the Queen, Coxhead, and Bishop of Sarum, Mo. 126; Nicholls v. How, or How v. Nicholl, 2 Vern. 389, Prec. Ch. 125.

(a) The King v. Smith, Wightw. 34.

(b) *Ib.*; Casberd v. Ward and Attorney General, 6 Price, 411, Dan. 238. See also 8 Co. 171; 2 Roll. Abr. 156, B. 1; Parker Rep. 103.

(c) Casberd v. Ward, 6 Price, 411, Dan. 238.

(d) 8 Co. 171; 2 Roll. Abr. 156, B. 1; Parker Rep. 103.

(e) M'Clel. Rep. 422.

(f) 1 Leon. 98; Parker Rep. 195; 8 Ves. 394.

(g) Hardr. 495, 496; 2 Freem. 130, 131; 3 Ch. Rep. 35; Nels. Rep. 132; M'Clel. Rep. 422.

(h) The King v. Coombes, 1 Price, 207.

(i) Sir Edward Coke's case, Godb. 289, 2 Roll. Rep. 294. Benl. 108, 117, ed. 1661, Jenk. Cent. c. 7, ca. 19; cited Hardr. 24, 495, 496, Hob. 339, and Parker Rep. 138.

lease for years, if he, before the *teste* of a writ of extent by the Crown, for a valuable consideration, and without fraud, sells the lease, such sale is binding on the king, and the land is not now extendable or liable to the debt.(j)

2. When a person is indebted to the Crown by simple Contract, if the money which constitutes that debt is money, come into the hands of an individual holding no office known to the public to be an accountable office, then if while he is so indebted to the Crown by simple contract, and before the debt is by inquisition recorded, he conveys land to a purchaser for valuable consideration, and without fraud, and without notice of the debt, the land so conveyed is not, in the hands of the purchaser, bound by such simple contract debt, and consequently cannot be extended for it.(k)

The following case shows that a purchaser, who takes possession, and pays a part of the purchase-money, and lays out money in improving the property, before the conveyance is made to him, may be affected by a bond, by the vendor entered into to the Crown more than a twelve-month after the purchaser took possession. In *Rex v. Hollier*, application was made to the Court for an *amoveas manus*, on the behalf of the purchaser of an estate seized under an extent. The extent had issued against the defendant for a debt of 10,000*l.* on two bonds to the Crown, dated respectively in August, 1813, and July, 1814. Two years and a half before defendant entered into the first of those bonds, he sold the estate to M., on whose behalf the present application was made, for a sum of money, which was to have been paid by three several payments; the last of which (4000*l.*) was payable, by that *agreement, before the date of the first bond, on the 12th of February, [*22] 1812, when M. was let into possession: but a satisfactory title not having been made, the conveyance was not completed when the extent issued. M. in the meantime having laid out a considerable sum of money in improving the property, now applied that he might be permitted to pay the remainder of the purchase-money to the Crown, or that he might be permitted to give up his claim to the estate, on satisfaction being made to him. The Crown, it was stated, had also seized other property of the defendant, to the amount of more than 6000*l.* The Court said, that they could not make any order in such a case, for that it was a matter of arrangement with the Crown; and they asked, why the applicant did not plead; to which it was answered, that he was precluded by his want of legal title. *Per Curiam*.—The object of this motion can only be effected by the consent of the Crown.(l)

In *Wilde v. Fort*, where at law a purchaser of a freehold ground-rent recovered back his deposit on certain objections to the title, one of those objections was, that the vendor was indebted to the Crown in the character of an accountant, within the statute 13 Eliz. c. 4.(m) On a sale of land by a person indebted by bond to the Crown, as by a receiver-general of the land-tax, and of the assessed taxes of a county, an act of parliament is on some occasions obtained, to enable the land to be sold free from the Crown's lien upon it.(n)

(j) Fleetwood's case, 8 Co. 171, cited Parker Rep. 103; Nicholls v. How, 2 Vern. 389, Prec. Ch. 125.

(k) The King v. Smith, Wightw. 34.

(l) 2 Price, 394.

(m) 4 Taunt. 334.

(n) Acts of this kind are, 7 G. IV. c. 12, and c. 28.

3. The following cases occur on a term of years attendant on the inheritance.—

In *The King v. John Smith*, W. T., being seised in fee simple, created in 1721 a term of 500 years, which by successive assignments became, on the 10th of October, 1795, assigned by A. C. to C. G., in trust to attend the inheritance and protect it against incumbrances. Before and at this time J. M. was seised in fee, subject to the term. By lease and release of 9th and 10th October, 1795, the fee simple was *bonâ fide* purchased of J. M. by J. S. for a valuable consideration, and conveyed by [*23] J. M. to J. S. *and G. S., and their heirs, to the uses in the same release mentioned; at the time of which conveyance neither C. G., nor J. S., nor G. S. had had any notice that J. M. was a debtor or an accountant to the king. J. M., the vendor, had been engineer in the service of government in North America, and first became indebted to the king, in 1778, and, on an extent issued in 1798, it was found that J. M. owed vast sums to government; a great balance remaining in his hands, which he had not accounted for. On these facts, the Court of Exchequer, in 1804, decided that the term of years, which, on the purchase by J. S., was assigned to his trustee, in trust to attend the inheritance and protect it against incumbrances, did not protect it against the Crown debts mentioned, and that, consequently, the fee simple might be extended notwithstanding such term.(o) In this case it is observable the term of years was held in trust for J. M., the vendor, at the time of the sale by him to J. S.,(p)—a circumstance that essentially distinguishes it from the latter case of *The King v. Lambe*.(q)

In *The King v. St. John*, H. B. D. became indebted to the Crown by bond, dated 24th September, 48 Geo. III. (1808.) He afterwards became seised in fee of certain messuages and premises conveyed to him absolutely by lease and release of 13th and 14th May, 1812; at which time, a satisfied mortgage term, created in 1800, was assigned to St. J., in trust for H. B. D. and his heirs, and to attend the inheritance. By lease and release of 29th and 30th June, 1812, H. B. D. conveyed the same premises to G. D. and J. M., and their heirs, to the intent that the same might be settled to the uses declared by a certain indenture of 2nd September, 1796, which appears to have been a settlement executed on, and previously to, the marriage of H. B. D. By Thomson, C. B.,—"The settlement of 1812 was voluntary, and there is no covenant in the articles of 1796 which specifically binds these lands. The assignment of the term, therefore, to St. J. cannot defeat the right of the Crown." The Court accordingly gave judgment for the Crown.(r)

[*24] *In *The King v. Lambe*, J. L., the Crown debtor, purchased in 1774 the fee simple of land, and to secure a part of the purchase money, the fee was conveyed to the use of C. S. V. S. for 1000 years, subject to redemption; and, in the meantime, subject to the same term, to the use of J. L. in fee. J. L. became indebted to the Crown by bond, entered into by him in 1776. In 1805, J. T. having become *bonâ fide* the purchaser of the estate, on a sale thereof by the assignees of J. L., who had become bankrupt, the mortgage money se-

(o) M'Clel. Rep. 417 n.; Sugd. Vend. & P. 6th ed. Append. 25.
(p) M'Clel. Rep. 424.

(q) M'Clel. Rep. 402.
(r) 2 Price, 317.

cured by the term was paid off out of the purchase-money, and the residue of the term was assigned to Lambe, in trust for J. T., and to attend the inheritance; and the reversion, subject to the term, was conveyed to J. T. in fee, neither Lambe nor J. T. having notice of the bond, or that J. L. was indebted to the king. On the ground that the term was never vested in any trustee for the Crown debtor, the Court held that Lambe was entitled to the possession of the lands for the residue of the term, and accordingly gave judgment for him against the Crown.^(s) In this instance, therefore, the purchaser was so far protected by the term, that this part of the fee simple purchased by him could not be extended for the Crown debt, and that, notwithstanding such debt, his trustee was entitled to keep possession for the remainder of the term.

SECTION IV.

OF LIEN, AND DEBTOR'S MORTGAGE BY DEPOSIT OF TITLE DEEDS.

An equitable mortgage by deposit of title deeds is valid against a simple contract debt, become, before the mortgage, due from the mortgagor to the Crown, in a case where the party who lends the money is a mortgagee, without fraud, and without notice of the debt; and the mortgagor is not an officer or accountant, within the statute 13 Eliz. c. 4, nor a person holding an office publicly known to be accountable, and which is not within the same statute; or if he does hold such latter description of office, the mortgagee is not at all cognizant of this fact.^(t) It [*25] is, however, decided, that a mortgage by deposit of title deeds is not available against a simple contract debt due to the Crown, although such debt is incurred after the mortgage; if, as against the Crown, the mortgage was not *bond fide* taken by the mortgagee; as where the mortgagee was the receiver-general of the taxes in a parish, and the mortgagor the collector of the same taxes, an office that made it probable that the mortgagor might be or soon become indebted to the Crown; and the consideration of the deposit was money advanced to the mortgagor, to enable him to make up his accounts of taxes collected; the receiver-general thereby upholding the collector's credit, and aiding him to go on to impose himself on the public as solvent.^(u)

SECTION V.

ON AN EXTENT; IN CHIEF, AND IN AID.

THERE are, in the case of Crown debts, two kinds of process called an extent; namely, an extent in *chief*, and an extent in *aid*. An extent in *chief* is where by the extent the Crown itself seizes either the property

(s) M'Clel. Rep. 402, 13 Price, 649.

(t) Casb. v. Ward and Attorney Gene-

ral, 6 Price, 411, Dan. 238. See also The King v. Smith, Wightw. 34.

(u) Broughton v. Davis, 1 Price, 216.

of its debtor,(v) or, in certain cases, a debt that is found due.(w) An extent in *aid* is where by the extent the Crown debtor seizes the property of his debtor,(x) or, in certain cases, a debt that is found due.(y)

[*26] If A. is indebted to the Crown, and B. to A., and the Crown *itself proceeds against B., and seizes his debt owing to A., this is an extent in chief in the second degree.(z)

When the extent is in chief, and the Crown seizes a debt owing by B. to A., the Crown debtor, B.'s debt is in the first degree. If the debt seized is owing by C. to B., indebted to A., C.'s debt is in the second degree. If the debt seized is owing by D. to C., indebted to B., indebted to A., D.'s debt is in the third degree. The debt may be either by specialty or by simple contract. And so far as the third degree it may be seized, but not beyond.(a) And, in computing the degrees, the king's debtor is not to be reckoned.(b)

It is not every debtor to the Crown who is entitled to an extent in *aid*. On this point, the statute 57 George III. c. 117,(c) which in several other respects regulates extents in *aid*, contains an express provision, occasioned, probably, by some cases that had a short time previously come before the Court of Exchequer.(d)

The fourth section of the statute enacts,—That it shall not be lawful for any person or persons, companies or societies of persons, corporate or not corporate, who shall or may be indebted to his majesty by simple contract only; nor for any such person or persons, companies or societies, who shall or may be indebted to his majesty by bond for answering, accounting for, and paying any particular duty or duties, or sum or sums of money, which shall arise or become due and payable to his majesty from such person or persons, companies or societies respectively, for and in respect and in the course of his or their particular trades, manufactories, professions, businesses, or callings; nor for any sub-distributor of stamps, who shall have given bond to his majesty; nor for any person who shall have given bond to his majesty, either jointly [*27] or separately, as a surety only for some other debtor *to his majesty, until such surety shall have made proof of a demand having been made upon him on behalf of his majesty, in consequence of the non-performance of the conditions of the bond by the principal, and then only to the amount of the said demand; to sue out and prosecute any extent or extents in *aid*, by reason or on account of any such debt or debts to his majesty respectively, for the recovery of

(v) 8 Price, 686, 687.

(w) Bunb. 24; 1 Price, 94, 95; 8 Price, 687, 688; 11 Price, 779. In Sir E. Coke's case, Dodderidge, J., said, a prerogative which the king hath is, "that the king shall have the debt of the debtor to the king's debtor paid unto him. 21 H. VII. 12, Abbot of Ramsay's case, the prior of Ramsay was indebted to the king, and another prior was indebted to the prior of Ramsay; and then it was pleaded in bar, that he had paid the same debt to the king, and the plea holden for a good plea." Godb. 290.

(x) The King v. Blatchford, 1 Anstr. 163; The King v. Bunney, 1 Price, 394; The King (in aid of Hughes) v. Wilton, 2

Price, 368; The King v. Larking, 8 Price, 683; Phillips v. Shaw, 8 Ves. 241.

(y) The King v. Tarleton, 9 Price, 647.

(z) The King v. Bell, and The King v. Shackle, 11 Price, 772, 779.

(a) Ewin's case, Parker, Appendix, 259, 260; The King v. Estate of H. Boon, Parker, 16, 19; The King v. Lushington, 1 Price, 94; The King v. Larking, 8 Price, 683.

(b) The King v. Lushington, 1 Price, 94.

(c) The King (in aid of Grant) v. Kynaston, 11 Price, 598; The King v. Bell, and The King v. Shackle, ib. 772.

(d) The King (in aid of Hughes) v. Wilton, 2 Price, 368; Rex v. Williams, 3 Price, 75.

any debt or debts due to such person or persons, companies or societies, or to such sub-distributor of stamps or surety as aforesaid; and that all and every commission and commissions to find debts, extent and extents in aid, and other proceedings which shall be so issued or instituted at the instance of or for such simple contract or bond debtor or debtors respectively, and all proceedings thereupon, shall be null and void. Provided always, that nothing herein contained shall extend or be construed to extend, to preclude or prevent any persons who shall or may become debtor or debtors to his majesty by simple contract only, by the collection or receipt of any money arising from his majesty's revenue for his majesty's use, from applying for any suing out any commission or commissions, extent or extents in aid, in case one or more of such persons shall be bound to his majesty by bond or specialty of record in the Court of Exchequer, for answering, securing, paying over, or accounting for, to his majesty, the particular duties or sums of money which shall constitute the debt that may be so then due from such person or persons to his majesty.

By a general order of the Court of Exchequer, dated June 22, 1822, —“It is ordered, that from henceforth no fiat for an extent in aid shall be granted, unless the party applying for the same, or some person or persons on his behalf, shall make affidavit, that, unless the process of extent for the debt due to him from his debtor be forthwith issued, the debt due to the Crown from the party applying will be in danger of being lost to the Crown.”(e)

*SECTION VI.

[*28]

OF A SALE UNDER AN EXTENT.

THE common law prerogative of the Crown to seize the land of its debtor did not extend to empower a sale of the land for payment of the debt, but was confined to a right to hold the land until the debt was levied out of the yearly rents and profits of it.(f) A statute of Elizabeth first gave authority to sell the land.(g) This Act, 13 Eliz. c. 4, received certain explanations by the statute 27 Eliz. c. 3; and an Act of Parliament passed in a late reign has materially altered the law contained in both those statutes.

The 25 Geo. III. c. 35, after reciting that “It may tend greatly to facilitate the payment of debts to the crown, where the real estates of its accountants, or debtors, or of their sureties, are seized into the king's hands under writs of extent, if a sufficient part of such estates was to be sold under the provisions of the Acts 13 and 27 Elizabeth; but the said Acts have not been lately put in use, and inconvenience is likely to arise if the mode of sale therein directed should be pursued,” proceeds to enact, “that it shall and may be lawful to and for his Majesty's Court of Exchequer, on the application of his Majesty's Attorney General in a summary way, by motion to the same Court, to order that the right, title,

(e) 11 Price, 160. See on this order *The King v. Bell*, and *The King v. Shackle*, 11 Price, 772.

(f) 6 Price, 463; Dan. Rep. 248; 2 Y. & J. 122; 3 Bl. Com. 419.

(g) 6 Price, 463.

estate, and interest of any debtor to his Majesty, his heirs and successors, and the right, title, estate, and interest of the heirs and assigns of such debtor, in any lands, tenements, and hereditaments, which have been, or shall hereafter be extended under and by virtue of any such writ of extent or *diem clausit extremum*, or so much thereof as shall be sufficient to satisfy the debt for which the same shall have been so extended, shall be sold in such manner as the said Court shall direct; and that when a purchaser or purchasers shall be found, the conveyance of the lands, tenements, or hereditaments, so decreed to be sold, *shall be [*29] made to the purchaser or purchasers by his Majesty's remembrancer in the said Court of Exchequer, or his deputy, under the direction of the said Court, by a deed of bargain and sale, to be enrolled in the same Court; and that from and after the making of such conveyance, and the enrolment thereof as aforesaid, the bargainee or bargainees in such conveyance, and his or their heirs, executors, administrators, and assigns, shall have, hold, and enjoy the lands, tenements, and hereditaments therein comprised, for his and their own respective use and benefit, not only against the extent of the Crown, but also against such debtor of the Crown, or the surety or sureties for such debtor, and all persons claiming under such debtor, or the surety or sureties, unless by a title paramount to, and available in law against, such extent as aforesaid. And all monies, which shall become payable from any such purchaser or purchasers as aforesaid, shall be paid, accounted for, and applied towards the discharge of the debt due to the Crown, and of all costs and expenses which shall be incurred by the Crown in enforcing the payment of such debt, in such manner as the said Court of Exchequer shall from time to time order and appoint; and if, after payment of the whole debt to the Crown, and of all costs and expenses incurred in enforcing the payment thereof, there shall be any surplus of the monies arising from any such sale, the said surplus shall belong to the same person or persons as would be entitled to the lands, tenements, or hereditaments sold, if there had not been a sale thereof, and shall accordingly be paid to such person or persons under the order and direction of the said Court of Exchequer, upon motion or petition to the said Court, to be made upon such notice to the Crown, and to be supported by such affidavits or other proofs, as to the said Court shall from time to time seem just and reasonable."

And the second section of the same statute, after reciting that "from the want of the deeds and writings relative to the title of such lands, tenements, and hereditaments, as the said Court of Exchequer may decree to be sold under this Act, difficulties may arise in the execution thereof," enacts farther, "that it shall be lawful for the said Court of Exchequer, [*30] from time to time, to *make such order touching the production, delivery, and custody, of such title deeds and writings as aforesaid, in the same manner as if a decree had been made by the said Court for the sale of the lands of a Crown debtor, in execution of a trust created for payment of debts by such Crown debtor himself."

The following cases^(h) have occurred under this statute. In *The King v. Cracroft*, where certain lands of the defendant were extended, and sold, and the purchaser approved of by the deputy remembrancer's

(h) See also *Wall v. Attorney General*, 11 Price, 643.

report, which was confirmed by the usual orders, conditional and absolute; but upon an inspection of the title deeds, it appeared that a title to an estate in the premises, for the life of the defendant's father, was all that could be made out by the Crown; the Court held that the Crown might discharge the purchaser from his purchase, against his consent, and without the payment of his costs, consequent on the purchase.⁽ⁱ⁾ In *The King v. Dyer*, the Court, in the exercise of the discretionary power possessed by it under the statute, directed land extended for penalties against the excise laws, to be sold by auction before a collector of excise at a particular place.^(j) In *Rex v. Bulkeley*, it was held a motion for sale need not be made by the Attorney General himself, but may be made by another person on his behalf.^(k) In *Rex v. Blunt*, on an extent issued against the defendant's estate, he was found to be possessed of certain goods and chattels, and also to be entitled to the residue of certain monies to arise from the sale of premises leased for lives, and for a farther term of years after the decease of the survivor. Under a writ of *venditioni exponas*, the sheriff sold this interest of the defendant in such leasehold premises. But the Court refused to confirm the sale, and to order the king's remembrancer to convey to the purchaser; the sale not being authorized by the common law, and being made without the order of Court, required by the statute.^(l) In *Rex v. Marsh*, where land extended was sold under an order of Court, and the purchaser objected to the sale, [*31] *on the ground that an agent of the Crown had employed a puffer at the auction; the Court held this circumstance sufficient to vitiate the sale, and accordingly refused to enforce the contract against the purchaser.^(m)

On a sale under a writ of extent, or decree or order of the Court of Chancery or Exchequer, the statute 1 and 2 Geo. IV. c. 121, s. 10, contains the following enactment,⁽ⁿ⁾—"That in all cases where any estate belonging to a public accountant shall be sold under any writ of extent, or any decree or order of the Court of Chancery or Exchequer, and the purchaser or purchasers thereof, or of any part thereof, shall have paid his, her, or their purchase-money into the receipt of his majesty's Exchequer, an entry of such payment shall be made by the commissioners for auditing the public accounts, in the declared account of such public accountant; and from and after such payment and entry as aforesaid, such purchaser or purchasers, his, her, and their heirs and assigns, shall be wholly exonerated and discharged from all farther claims of his majesty, his heirs or successors, for or in respect of any debt arising upon such declared account, although his, her, or their purchase money shall not be sufficient in amount to discharge the whole of the said debt."

Land bound by a Crown debt is, it appears, so far favoured, that when goods and land are seized under an extent, either in chief or in aid, the goods are first liable to be sold; and the Crown is not entitled to sell the land, unless the goods prove to be insufficient to satisfy the debt.^(o)

(i) *M'Clel. & Y.* 460.

(j) *Ibid.* 261.

(k) 1 *Y. & J.* 256.

(l) 2 *Y. & J.* 120; and see *Rex v. Boyd*, and *Rex v. Adam*, *ib.* 122, n.

(m) 3 *Y. & J.* 331.

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(n) See *Sugd. Vend. & P.* 6th ed. 692.

(o) *Magna Charta*, 9 Hen. III. c. 8, 2 Inst. 18; *The King (in aid of Simpson) v. Hopper*, 3 Price, 40. See also *The King v. Lambe*, *M'Clel.* 402.

SECTION VII.

OF CERTAIN TITLES PREFERRED TO THE LIEN OF THE CROWN.

WHEN a debtor to the Crown by bond is indebted to a subject by judgment, and the judgment is earlier than the debt to the *Crown, [*32] then, if before process issues to recover the Crown debt, the debtor's land is extended under the judgment, this execution executed is valid against the Crown, and an extent now at the suit of the Crown cannot affect this execution of the subject.(p)

And, generally speaking, the Crown, when it extends land, takes it subject to a charge or settlement that is earlier than the lien of the Crown.(q) Thus, in *Poole v. the Attorney General*, where an estate was extended, the Crown was held to take it, subject to legacies charged on it. The facts were, P. devised his estate to A., paying 200*l.* a piece to his grandchildren; with a power to enter for non-payment. A. sold the estate to B.; B. being indebted to the Crown, the estate was seized and extended; P.'s grandchildren brought a bill against the Attorney General and B., to have the legacies and charge the estate therewith; and it was decreed accordingly.(r)

SECTION VIII.

OF PARTICULAR INSTANCES OF FRAUD AGAINST THE CROWN.

IN *Chirton's case*, one W. de C. was indebted to the king in a large sum for customs. It was found by inquisition, that he had purchased certain lands with the king's money, and by covin caused the vendor to enfeof his friends in fee, to defraud the king, and nevertheless, took the issues and profits of the land to his own use. But the Court of Exchequer adjudged those lands to be seized to satisfy the debt to the Crown.(s) And in *Favel's case*, one T. F., a collector of the fifteenth and tenth, being seised of certain land in fee simple, and having divers goods and chattels *die intromissionis de collectione et levatione* of the fifteenth and tenth [*33] aforesaid, in extremity of illness aliened his tenements and his goods and chattels to divers persons, and died without heir or executor. And here process was issued against the terre-tenants and possessors of the goods and chattels, to account for the collection aforesaid, and to answer and satisfy the king.(t)

(p) *Curson's case*, 3 Leon. 239, 4 Leon. 10; *Attorney General v. Andrew, Hardr.* 23, cited 4 Durn. & E. 413, and 16 East, 282; stat. 33 H. VIII. c. 39, s. 74.

(q) 2 Rol. Abr. 156, B. 3; *Foskew's case*, 2 Leon. 90.

(r) *Parker Rep. append.* 272.

(s) 2 Dyer, 160 a., also stated 11 Co. 92 b., and 12 Co. 3. See likewise 2 Rol. Abr. 160, K.

(t) 2 Dyer, 160 a.; also stated 12 Co. 3.

SECTION IX.

OF THE DEBTS OF A CROWN DEBTOR DECEASED.

On the subject of debts of a Crown debtor deceased, may be noticed,—

I. The voluntary payment by an executor of,—1. a debt owing by his testator to the Crown; and,—2. a debt owing by his testator to a Crown debtor.

II. The Crown's compulsory process of *Diem clausit extremum* to obtain payment.

I.—1. Magna Charta, 9 Henry III. c. 18, enacts:—"If any that holdeth of us lay-fee do die, and our sheriff or bailiff do shew our letters patent of our summon for debt, which the dead man did owe to us, it shall be lawful to our sheriff or bailiff to attach and enrol all the goods and chattels of the dead, being found in the said fee, to the value of the same debt, by the sight and testimony of lawful men, so that nothing thereof shall be taken away, until we be clearly paid off the debt; and the residue shall remain to the executors to perform the testament of the dead."

On this enactment, Sir E. Coke says, it is to be observed, "First, that the king, by his prerogative, shall be preferred in satisfaction of his debt by the executors, before any other. Secondly, that if the executors have sufficient to pay the king's debt, the heir that is to bear the countenance, and sit in the seat of his ancestor, or any purchaser of his lands, shall not be charged."^(u)

When a testator dies indebted to the Crown by debt on record, as by judgment or recognizance of a Court of Record, or by bond, an instrument to which the statute 33 Henry VIII. c. 39, gives the force of a statute staple, these debts on record, or by bond, *the executor is bound to pay before the testator's debts by judgment, [*34] or specialty, or any other description, owing to a subject.^(v) It is a devastavit in an executor, if he pays the debt of a subject before the Crown's debt upon record.^(w)

When a testator dies indebted to the Crown by simple contract, a subject's debt by judgment is, perhaps, to be paid before such crown debt.^(x) But an express decision exists, that a debt by simple contract due to the king is to be preferred before a subject's debt by bond. In *The King v. Thomas Burnett*, "there was an information against him, as administrator of W. B., for 100*l.* received by W. B., to the king's use. The defendant pleads, that W. B., in his lifetime, was indebted to the defendant by bond in 1,600*l.*; and pleads *plene administravit*, besides goods to the value of 5*l.*, which he retained towards satisfaction of his debt, of 1,600*l.*; to which plea the Attorney-General demurred; and judgment was given for the king, that a debt by simple contract due to the king was to be preferred before a debt by bond to a subject. And this judg-

(u) 2 Inst. 32. See also Parker Rep. 99.

(w) Com. 438; 16 East, 281. See also

(v) *Skrogs, or Scrogs, v. Gresham*, 1 An-

4 B. and C. 416, n.

ders. 129, Mo. 193.—1 Rol. Abr. 927, 8.

(x) 2 Rol. Abr. 159, H. 8; Parker Rep.

5; Com. 438; 7 B. and C. 452; Went. Off.

101. See Lane Rep. 65.

Ex. 14th ed. 261—266; 2 Bl. Com. 511.

See Lane Rep. 65.

ment was affirmed upon a writ of error in the Exchequer chamber, and the affirmance of it is entered of the same term." This decision, so affirmed, is cited by Lord Chief Baron Parker, in a case reported by himself. (y) After this decision, made in the strong case of a representative, who claimed to retain his debt; and considering the general inclination of the law to prefer, in payment of debts, the crown to a subject; (z) an executor can never be advised to prefer a simple contract debt of a subject to a simple contract debt of the Crown, notwithstanding some appearance of authority, and even an opinion of Lord Hardwicke, (a) that seems to invest the executor with this right of preference. (b)

[*35] *2. Of a debt which a testator owes to a debtor of the Crown, it may be stated, that if A. is indebted to the Crown by bond, and B., the testator, is indebted to A. by simple contract, and to other persons by bond, and after B.'s death an extent issues on A.'s bond, and by an inquisition, taken before payment of B.'s bond debts, his debt to A. by simple contract is found, and accordingly by such inquisition made a debt of record; here the Crown is entitled to be paid this debt, before the testator's creditors by bond. In such a case, the Court held, "That the seizure by the inquisition of the simple contract debt into the king's hands, preferred it to the bonds not paid before the seizure, and would be a good plea to actions on such bonds; because it is thereby become a debt to the king upon record, and implies notice. But they also held, that if the bonds had been paid before the inquisition, or before the administrator had actual notice of the debt to the king, such payment would have been good against the king; because there was no debt upon record, and the administrator had no means to discover whether there were any, or what debts to the king; and the inconvenience would be infinite, if in such cases executors or administrators should, notwithstanding their utmost care, be charged with the misapplication of assets out of their own estates." (c) When a testator dies indebted by judgment and bond, and indebted by simple contract to a Crown debtor, and after the testator's death the bond creditor obtains judgment, but before this judgment the testator's simple contract debt is seized into the king's hands; here the debt so seized is payable after the precedent, and before the subsequent, judgment creditor. In *The King v. Dickenson*, a case of this kind, "It was adjudged for the king that his debt should be preferred before the subsequent judgments, viz. before any bond, (Hardr. 23:) but a precedent judgment should be preferred before it, upon the words of the 26th [74] section of the statute 33 Henry VIII. c. 39,—so always that the king's suit be taken and commenced, or process awarded for the debt of the king, before judgment given for the other persons." (d)

[*36] *II. When a person dies indebted to the Crown by bond, the Crown may by a writ of *diem clausit extremum* seize

(y) Parker, 101. See also 102.

(z) Stat. 9 H. VIII. c. 18; 2 Inst. 32; Cro. Eliz. 793; Godb. 290, 293; Parker Rep. 99, 101; 4 B. and C. 416, n.; 7 B. and C. 452; Skrogs, or Scrogs, v. Gresham, 1 Anders. 129, Mo. 193.

(a) Otway v. Ramsey, 4 B. and C. 416, n.

(b) 1 Rol. Abr. 927, U. 6; Mo. 193; Com.

438. See Parker Rep. 102.

(c) *The King v. Allanson*, Parker, Appendix, 260; *Attorney General v. White*, Com. 433, 438.

(d) *The King v. Dickenson*, Parker, Appendix, 262.

his goods and chattels, and freehold land;(e) and in the case of lands descended from and lands devised by him, the Crown may, if it pleases, seize first the lands that are devised.(f)

And when a person dies indebted to the Crown by simple contract, and this fact is after his death found by inquisition, then immediately after such inquisition, the effect of which is to make the simple contract debt a debt of record, the Crown is entitled to the writ *diem clausit extremum* against its debtor's estate;(g) and perhaps it may be stated, that under this writ may be seized the debtor's goods and chattels, which he was possessed of, and the land of which he was seised, at the time of his death.(h) The Crown is not, however, entitled to such writ before the simple contract debt is so found by the inquisition, and thereby made a debt of record.(i)

When a *diem clausit extremum* may issue, it issues without waiting for an executor or administrator.(j)

It is decided that the Crown is not entitled to the writ *diem clausit extremum* against the estate of a deceased person, who neither died indebted to the king, nor was before his death found by inquisition to be indebted to the king's debtor, or, within the degrees, to some other person.(k)

In *Ex parte Hippesley*, application was by a bond debtor to the Crown made to the Court of Exchequer, for a writ of *diem clausit extremum* against the estate of a person, who died indebted by simple contract to such bond debtor. But the Court said, "A *diem clausit extremum* may certainly issue, at the instance of the Crown, against the estate of its debtor in a proper case; but never in aid, unless the debt has been found in the lifetime of the debtor. The case in *Parker*(l) is decisive on that point."(m)

(e) Com. 437; Savile, 52; Parker Rep. 96, 97; M'Clel. Rep. 105.

(f) The King v. The Estate of G. Hasell, M'Clel. 105, 13 Price, 279.

(g) The King v. The Estate of Edward Curtis, Parker, 95.

(h) Parker Rep. 96.

(i) Parker Rep. 98, 103.

(j) 16 East, 281.

(k) The King v. The Estate of Henry Boon, Parker, 16; The King v. The Estate of Edward Curtis, ib. 100.

(l) Rex v. The Estate of Henry Boon, Parker 19.

(m) 2 Price, 379.

[*37]

*CHAPTER III.

OF A DEVISE OF REAL ESTATE, IN TRUST FOR THE PAYMENT OF
DEBTS, OR DEBTS AND LEGACIES.SECT. I. *Chattel Estate created by the Will.*II. *Copyholds devised.*III. *Trust to raise Money out of Rents and Profits.*IV. *Resulting Trust for the Testator's Heir at Law.*V. *Exemption of the Testator's Personal Estate.*VI. *Responsibility of a Purchaser from the Trustees.*VII. *Reviving Simple Contract Debts barred by the Statute
of Limitations, 21 James I. c. 16.*VIII. *Miscellaneous Points of the General Subject.*

SECTION I.

CHATTEL ESTATE CREATED BY THE WILL.

A DEVISE of land for the payment of debts; is sometimes of a chattel estate in the land. When, for the purpose of paying debts, lands are devised to A., until B. shall attain the age of twenty-one, A.'s estate in the land will not cease, although B. dies under age. The words are construed to mean, until B. shall or should have come to the age mentioned. (a) And when by a devise of real property to executors, in trust for the payment of debts, they take a chattel estate until the debts are paid, their estate in the land will determine so soon as the debts are paid; [*38] or, *if they misapply the yearly rents and profits, at such time as they might have paid the debts, if they had duly applied those rents and profits in the payment of them. And where there is such misapplication, the lands are notwithstanding discharged, and the creditors' remedy is against the executors. (b)

SECTION II.

COPYHOLDS DEVISED.

WHEN by a person deceased before the statute 55 Geo. III. c. 192, copyhold lands are, by the name of copyholds, devised in trust for the payment of the testator's debts, a Court of Equity will supply a surrender to the use of the will. (c) And when by a person so deceased land is

(a) *Boraston's case*, 3 Co. 19, 21; *Lomax v. Holmeden*, 3 P. W. 177; *Martin v. Woodgate*, Prec. Ch. 34. See also *Ironmonger v. Lassells*, 1 West Cas. T. Hardw. 143.

(b) *Carter v. Barnadiston*, 1 P. W. 505, 518, cited 1 Ball. and B. 54; *Anon.* 1 Salk.

153, cited 5 Ves. 736. See also *Gugelman v. Duport*, 1 West Cas. T. Hardw. 577.

(c) *Bixly*, or *Bixby v. Eley*, 2 Dick. 698, 2 Bro. C. C. 325; *Morris v. Clarkson*, 3 Swanst. 558.

devised for the payment of his debts, and this devise is made in general terms, as by the words "real estate," or the words, "messuages, lands, tenements, and hereditaments," and these words are satisfied by freehold lands of the testator; copyholds, although not surrendered to the use of the will, will, if necessary for the payment of the debts, pass under the devise; and a Court of Equity will supply a surrender to the use of the will. But the copyholds will not pass, and the surrender will not be supplied, if the copyhold lands are not necessary to pay the debts.(d) It is lately decided, that by the will of a person, deceased since the statute 55 Geo. III. c. 192, copyholds will pass under a general devise of real estate, notwithstanding there is no surrender to the use of the will.(e)

*SECTION III.

[*39]

TRUST TO RAISE MONEY OUT OF RENTS AND PROFITS.

A DEVISE of land, in trust to pay debts out of the profits, or out of the rents and profits, authorizes a sale of the land,(f) unless, by the context, yearly rents and profits only are meant.(g) The land cannot be sold, if the trust is, to pay the debts out of the yearly rents and profits only;(h) or, "to set and farm let, and out of the rents" to pay the debts;(i) or, "by perception of rents and profits, or by leasing, or by mortgaging," to raise sufficient money to pay the debts.(j)

SECTION IV.

RESULTING TRUST FOR THE TESTATOR'S HEIR AT LAW.

WHEN a will contains a devise of real estate of inheritance, in trust for the payment of debts, or debts and legacies, then, so far as this fund is not required for the purpose, a trust will, unless a contrary intention appears in the will, result for the testator's heir; who accordingly, if the estate is not required to be sold, will be entitled to a reconveyance of it.(k) And such heir will, in the event of a sale, be entitled to the sur-

- (d) *Mallabar v. Mallabar*, Cas. T. Talb. 78; *Drake v. Robinson*, 1 P. W. 443; *Haslewood v. Pope*, 3 P. W. 322; *Goodwyn v. Goodwyn*, 1 Ves. 326; *Lindopp v. Eborall*, 3 Bro. C. C. 188; *Kidney v. Commaker*, 12 Ves. 136, 156; *Judd v. Pratt*, 15 Ves. 394.
- (e) *Doe v. Ludlam*, 7 Bing. 275, 5 Moore and P. 48.
- (f) *Lingon v. Foley*, 2 Ch. Cas. 205; *Anon.* 1 Vern. 104; *Berry v. Askham*, 2 Vern. 26; *Price v. Seys*, Barn. Ch. Rep. 117, 120; *Ridout v. Earl of Plymouth*, 2 Atk. 105; *Baines v. Dixon*, 1 Ves. 41, 42; *Lingard v. Earl of Derby*, 1 Bro. C. C. 311; *Bootle v. Blundell*, 19 Ves. 528.
- (g) *Heneage v. Lord Andover*, 3 Y. and J. 360.
- (h) *Anon.* 1 Vern. 104; *Cook v. Parsons*, Prec. Ch. 184; *Lingard v. Earl of Derby*, 1 Bro. C. C. 311. See also *Conyngham v. Conyngham*, 1 Ves. 522.
- (i) *Cook v. Parsons*, Prec. Ch. 184.
- (j) *Ridout v. Earl of Plymouth*, 2 Atk. 105.
- (k) *Buggins v. Yates*, 9 Mod. 132.

[*40] plus land unsold, or surplus money produced by the sale,^(l) *unless a contrary intention appears in the will;^(m) as where the intention is, to give such surplus land or money to the party himself, to whom the estate is devised in trust for sale.⁽ⁿ⁾ And if the the testator creates out of his real estate a term of years, in trust for the payment of debts, or debts and legacies, this term will, unless a contrary intention appears in the will, result for his heir, after the purposes of its creation are satisfied.^(o) In *Gore v. Blake*, where lands of inheritance were devised for a term of years, in trust to pay debts, and, subject to this term, were limited over, the residue of the term, together with the surplus rents and profits after the debts paid, were held not to belong to the devisee in remainder, or to the testator's heir at law, but, on the intention, to the trustee of the term.^(p) When on a devise of land, in trust to be sold for the payment of debts, or debts and legacies, a trust results for the testator's heir at law, it appears that the heir is entitled to redeem the estate, and to prevent a sale, by payment of the debts and legacies charged on it.^(q)

SECTION V.

EXEMPTION OF THE TESTATOR'S PERSONAL ESTATE.

A TESTATOR's personal estate is, in a Court of Equity, the natural and first fund for the payment of his debts;^(r) and, *unless his [*41] creditors please, he cannot exempt it from this liability.^(s) But, except as against his creditors, a testator may, if he thinks proper, throw the burthen of his debts, some, or all of them, on his real property; and, so far as this fund is sufficient for the purpose, exempt his personal estate from the payment of them.^(t)

Formerly it seems to have been held, that if a person devised real estate, in trust for the payment of his debts, or debts, legacies, and fune-

(l) *Gale v. Crofts*, 4 Vin. Abr. 468, 2 Eq. Cas. Abr. 494; *Wych v. Packington*, 21 Vin. Abr. 499, 2 Eq. Cas. Abr. 507, 3 Br. P. C. ed. Toml. 44; *Kiricke v. Bransbey*, 21 Vin. Abr. 499, pl. 18 n., 2 Eq. Cas. Abr. 508; *Roper v. Radcliffe*, 9 Mod. 171, 5 Bro. P. C. ed. Toml. 360; *Culpepper v. Aston*, 2 Ch. Cas. 115, 221; *Starkey v. Brooks*, 1 P. W. 390; *Cruse v. Barley*, 3 P. W. 20; *Digby v. Legard*, 2 Dick. 500, 3 P. W. 5th ed. 22, n.; *Kinaston v. Kinaston*, 2 Dick. 506; *Ackroyd, or Akeroyd v. Smithson*, 1 Bro. C. C. 503, 2 Dick. 566, 3 P. W. 5th ed. 22, n.; *Robinson v. Taylor*, 2 Bro. C. C. 589, 1 Ves. jun., 44; *Halliday v. Hudson*, 3 Ves. 210; *Wright v. Wright*, 16 Ves. 188; *Southouse v. Bate*, 2 Ves. and B. 396.
(m) *Tyrwith, or Tyrwhitt v. Trotman*, 21 Vin. Abr. 499; 2 Eq. Cas. Abr. 507; 3 Br. P. C. ed. Toml. 52. See also *Hawkins v. Chappel*, 1 Atk. 621, and *Walton v. Walton*, 14 Ves. 322.

(n) *North v. Crompton*, 1 Ch. Cas. 196, cited 9 Mod. 188, and 1 Ball and B. 543; *Coningham, or Cunningham, v. Mellish*, Prec. Ch. 31, 1 Eq. Cas. Abr. 273, 2 Vern. 247, and 3d ed. n. 5; *Mallabar v. Mallabar*, Cas. T. Talb. 78; *Rogers v. Rogers*, *ibid.* 268, 3 P. W. 193; *Hill v. Bishop of London*, 1 Atk. 620; *Humphrey v. Tayleur*, Amb. 137. See also *King v. Denison*, 1 Ves. and B. 272, 273.

(o) *Cook v. Guavae*, cited 2 Vern. 645; *Harris v. Bishop of Lincoln*, 2 P. W. 138; *Levet v. Needham*, 2 Vern. 138.

(p) 1 Ch. Rep. 263; 1 Ch. Cas. 98.

(q) *Hawkins v. Chappel*, 1 Atk. 622; *McClelland v. Shaw*, 2 Sch. and Lef. 545.

(r) 2 Ves. 52; 1 Cox, 11; 1 Mer. 230; 19 Ves. 518.

(s) 3 P. W. 325; Amb. 37; 2 Atk. 624; 1 Wils. 24.

(t) *Bootle v. Blandell*, 1 Mer. 193.

ral expenses; and bequeathed all his personal estate, or, after certain specific legacies, the residue of the personal estate, to his executor; such devise and bequest implied an intention to exempt the personalty from the payment of debts, and were alone or of themselves sufficient for the purpose. (u) At another time, but, it may be mentioned, near a century later than *Feltham v. Harlston*, and the resolution there referred to, it appears to have been understood, that the personal estate could not be exempted by implication, and that express negative words were necessary to create this exemption. (v) Formerly, also, it was allowed to collect the intention from the state of the testator's affairs and parol evidence. (w) And a distinction was once made between a devise to sell, and a charge only, for the payment of debts; a devise having been thought stronger than a charge to raise an implication of exemption. (x)

But clearly it is now agreed, that the distinction between a devise and a charge is exploded; (y) and it is decided, that the intention of the testator must appear from the will itself, and *cannot be collected [*42] from the state of the testator's affairs, as the amount of his debts, or of his real or personal property, or from other extrinsic circumstances, or parol evidence; (z) that express words are not necessary to create the exemption of the personal estate, (a) but that a devise of real estate, in trust for the payment of all the testator's debts, or debts and legacies, and an unspecific bequest of the whole of his personal estate to his executor, are not alone or of themselves sufficient to raise an implication strong enough to cause that exemption. (b)

The rule now is, that a devise of real estate, in trust, as out of the yearly rents and profits, or by sale or mortgage, to pay the testator's debts, is not alone or of itself sufficient to free his personal estate from its natural liability to be first applied to satisfy such debts. Notwithstanding the devise, the testator's personal property will continue to be the first fund applicable for the payment of his debts, (c) unless, on an examina-

(u) *Feltham v. Executors of Harlston*, 1 Lev. 303, cited 3 Ball & B. 528; *Bicknel v. Page*, 3 Atk. 79.

(v) *Pereyes v. Robertson*, Bunb. 301; *Phipps v. Annesley*, 3 Atk. 57; *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 462; *Watson v. Brickwood*, 9 Ves. 453; *Hancox v. Abbey*, 11 Ves. 186; *Boote v. Blundell*, 1 Mer. 216.

(w) *Barnfield v. Wyndham*, Prec. Ch. 101; *Wainwright v. Bendlowes*, 2 Vern. 718; *Countess of Gainsborough v. Earl of Gainsborough*, 2 Freem. 188, 2 Vern. 252; *Stapleton v. Colville*, Cas. T. Talb. 208; *Boote v. Blundell*, 1 Mer. 220, 229.

(x) *Wainwright v. Bendlowes*, 2 Vern. 718, Prec. Ch. 451; *Hayford v. Benlows*, S. C. Amb. 581; *Adams v. Meyrick*, 1 Eq. Cas. Abr. 271; *Stapleton v. Colville*, Cas. T. Talb. 208.

(y) *McClelland v. Shaw*, 2 Sch. & Lef. 545; *Stapleton v. Stapleton*, 2 Ball & B. 527.

(z) *Gale v. Croft*, 1 Dick. 23; *Stephenson v. Heathcote*, 1 Eden, 38, 43; *Lord Inchiquin v. French*, 1 Cox, 9; *Brummel v. Pro-*

thero, 3 Ves. 111, 113; *Boote v. Blundell*, 1 Mer. 216, 220; *Aldridge v. Lord Wallacourt*, 1 Ball and B. 312, 315.

(a) *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 460; *Webb v. Jones*, 1 Cox, 245, 2 Bro. C. C. 60, cited from Bro. C. C. in 2 Sch. and Lef. 544, and 2 Ball and B. 527, 528; *Rhodes v. Rudge*, 1 Sim. 85.

(b) *Haslewood v. Pope*, 3 P. W. 322; *Brummel v. Prothero*, 3 Ves. 111.

(c) *Anon.* 2 Vent. 349; *Middleton v. Middleton*, 2 Ch. Rep. 377, cited 2 Freem. 189; *Lord Grey v. Lady Grey*, 1 Ch. Cas. 297; *Lovel v. Lancaster*, 2 Vern. 183; *Cutler v. Coxeter*, ib. 303, and 3rd ed. n.(1); *French v. Chichester*, ib. 568, 3 Br. P. C. ed. Toml. 16; *Gale v. Crofts*, 4 Vin. Abr. 468, 2 Eq. Cas. Abr. 494, 1 Dick. 23; *Dolman v. Smith*, Prec. Ch. 456, 2 Vern. 740, Gilb. Eq. Rep. 128; *Noke v. Darby*, 1 Br. P. C. ed. Toml. 506; *Pereyes v. Robertson*, Bunb. 301; *Haslewood v. Pope*, 3 P. W. 322, 324; *Haslewood v. Child*, apparently S. C., cited Cas. T. Talb. 204, 209; *Lord Inchiquin v. French*, or *Lord O'Brien*, Amb. 33, 1 Cox,

tion of all the parts of the will, (*d*) it from some part clearly appears to be his *intention to exempt his personal estate from such liability, [*43] in which case the intended exemption will take place. (*e*)

In *Hancox v. Abbey*, a testator's personal estate was held to be exempted from the payment of two particular sums, namely, a mortgage debt and a legacy. (*f*)

On each case as it arises, the question of exemption is by Lord Eldon stated to be—"Does there appear, from the whole testamentary disposition taken together, an intention on the part of the testator so expressed, as to convince a judicial mind that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal?" "For," adds his Lordship, "it is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided." (*g*)

An intent to exempt the personal estate may in some cases be inferred from the particular terms of the devise to pay debts, or of the disposition of the testator's personal estate. (*h*)

It has been seen, however, that unless a contrary intention is apparent from some other part of the will, the testator's personalty is first applicable, notwithstanding real estate is devised in trust for the payment of all his debts; and it is, it may be particularly mentioned, so applicable, although a term of years is created out of the inheritance, and devised for [*44] the purpose; (*i*) and although *the devise to pay debts is not of the whole of the testator's real estate, but of a part only, or of particular lands. (*j*)

The exemption of personalty from the payment of debts is sometimes effected by express words of exoneration used in the will. (*k*) If the per-

1, 1 Wils. 82; *Stephenson v. Heathcote*, 1 Eden, 38; *Wrightson v. Attorney General*, 1 West Cas. T. Hardw. 187; *Samwell v. Wake*, 1 Bro. C. C. 144, 2 Dick. 597; *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; *Gray v. Minnethorpe*, 3 Ves. 103; *Brummel v. Frothero*, ib. 111; *Tait v. Lord Northwick*, 4 Ves. 816; *Hartley v. Hurlie*, 5 Ves. 540; *Brydges v. Phillips*, 6 Ves. 567; *Watson v. Brickwood*, 9 Ves. 447, cited 1 Mer. 230; *Tower v. Lord Rous*, 18 Ves. 132; *Elton v. Harrison*, 2 Swanst. 270, n. *Rhodes v. Rudge*, 1 Sim. 79; *McClelland v. Shaw*, 2 Sch. and Lef. 538. See also *Hall v. Brooker*, Gilb. Eq. Rep. 72; *Reade v. Litchfield*, 3 Ves. 475; and *Howe v. Earl of Dartmouth*, 7 Ves. 149.

(*d*) *Williams v. Bishop of Llandaff*, 1 Cox, 257; *Tait v. Lord Northwick*, 4 Ves. 824; *Boote v. Blundell*, 1 Mer. 217; *Gittins v. Steele*, 1 Swanst. 28.

(*e*) *Peacock v. Glascock*, 1 Ch. Rep. 45; *Wainwright v. Bendlowes*, 2 Vern. 718, Prec. Ch. 451; *Mainwright v. Bendloe*, S. C. Gilb. Eq. Rep. 125; *Hayford v. Benlows*, S. C. Amb. 581, cited Cas. T. Talb. 208; *Adams v. Meyrick*, 1 Eq. Cas. Abr. 271, cited 2 Atk. 79, 626, and 3 Ves. 110; *Waise v. Whitfield*, 8 Vin. Abr. 437, 2 Eq. Cas. Abr. 374, 495; *Bowersby v. Bowyer*, 11 Vin. Abr. 424, 2 Eq. Cas. Abr. 461; *Chester v. Pain-*

ter, 2 P. W. 335; *Stapleton v. Colville*, Cas. T. Talb. 202; *Attorney General v. Barkham*, cited ib. 206, 210; *Walker v. Jackson*, 2 Atk. 624, 1 Wils. 24; *Philips v. Nicholas*, and *Holliday v. Bowman*, cited 1 Bro. C. C. 145; *Anderton v. Cook*, cited ib. 456; *Kynaston*, or *Kinaston v. Kynaston*, 2 Dick. 506, 1 Bro. C. C. 457, n.; *Webb v. Jones*, 1 Cox, 245, 2 Bro. C. C. 60, cited from Bro. C. C. in 2 Sch. & Lef. 542, 544, and 2 Ball & B. 527, 528; *Burton v. Knowlton*, 3 Ves. 107; *Gaskill v. Hough*, cited ib. 110; *Waring v. Ward*, 5 Ves. 670, 676; *Boote v. Blundell*, 19 Ves. 494, 509, 1 Mer. 193; *Greene v. Greene*, 4 Madd. 148; *Michell v. Michell*, 5 Madd. 69; *Dixon v. Dawson*, 3 Sim. & S. 327. See *Hall v. Brooker*, Gilb. Eq. Rep. 72.

(*f*) 11 Ves. 179.

(*g*) *Boote v. Blundell*, 1 Mer. 230. See also *ibid.* 230.

(*h*) *Hancox v. Abbey*, 11 Ves. 186.

(*i*) *Walker v. Jackson*, 2 Atk. 624, 625; *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; *Tower v. Lord Rous*, 18 Ves. 132.

(*j*) *Stephenson v. Heathcote*, 1 Eden, 38; *Bridgman v. Dove*, 3 Atk. 301.

(*k*) *Hall v. Brooker*, Gilb. Eq. Rep. 73, 74, 2 Eq. Cas. Abr. 494; *Morrow v. Bush*, 1 Cox, 185; *March v. Fowke*, Cas. T. Finch, 414.

sonal estate is specifically bequeathed, it is then also exempted.(l) But unless a contrary intention is apparent from some other part of the will, a testator's personal estate is first applicable to pay his debts, notwithstanding he devises real property to pay them, and unspecifically gives away his personal estate;(m) and particularly if this gift is to the executor of the will,(n) or is, after general or pecuniary legacies bequeathed, of the residue of the personal estate;(o) or if the gift of the personalty is to the executor appointed by a will, which makes no mention of personal estate, except by the mere nomination of an executor.(p) And the testator's personal estate will, before the real property, be applicable to pay his specialty debts, notwithstanding he directs that his executor, to whom he gives all his personal estate, shall pay thereout all his legacies, funeral expenses, and simple contract debts.(q)

An argument for or against exemption may be drawn from any part of the will. An inference *in favour* of exemption has sometimes been taken from the circumstance, that real estate is devised in trust to pay debts, and funeral and testamentary expenses;(r) that the trustees to whom the real estate is devised are not the *executors of the will;(s) [*45] that the devise is in trust to pay debts and funeral expenses, and the trustees are not the executors of the will;(t) that on a devise of real estate, in trust for sale, and after sale in trust, in the first place, to pay debts, legacies, and funeral expenses, the testator directs, that, after those payments, the residue of the purchase-money is to be added to his other personal estate.(u)

An inference *against* exemption has sometimes been taken, from an omission in the will to provide for the payment of funeral, or funeral and testamentary expenses;(v) and from the circumstance, that the trustees of the real estate are the executors of the will.(w)

Lord Hardwicke and Sir W. Grant appear to have thought, that the circumstance that the testator devises real estate, in trust to pay his funeral and testamentary expenses, as well as his debts, is not entitled to much weight in determining a question of exemption.(x) Some weight, however, must, it should seem, be given to it:(y) not much, perhaps, where the trust fund is given to persons who are also the executors of the will,

(l) *Adams v. Meyrick*, 1 Eq. Cas. Abr. 371; *Walker v. Jackson*, 2 Atk. 624, 1 Wils. 24; *Hartley v. Hurle*, 5 Ves. 545, 546; *Tower v. Lord Rous*, 18 Ves. 138, 139; *McClelland v. Shaw*, 2 Sch. & Lef. 544; *Bradnox v. Gratwick*, cited 3 P. W. 325.

(m) *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; *Tower v. Lord Rous*, 18 Ves. 132; *Aldridge v. Lord Wallscourt*, 1 Ball & B. 316.

(n) *Haslewood v. Pope*, 3 P. W. 322; *Stephenson v. Heathcote*, 1 Eden, 38; *Brumme v. Prothero*, 3 Ves. 111.

(o) *Fereyes v. Robertson*, Bunb. 301; *Samwell v. Wake*, 1 Bro. C. C. 144, 2 Dick. 597; *Tait v. Lord Northwick*, 4 Ves. 816, 824; *Hartley v. Hurle*, 5 Ves. 540; *Tower v. Lord Rous*, 18 Ves. 132.

(p) *Gray v. Minnethorpe*, 3 Ves. 103; *Stapleton v. Stapleton*, 2 Ball & B. 523.

(q) *Watson v. Brickwood*, 9 Ves. 447, 454.

(r) *Hartley v. Hurle*, 5 Ves. 542, 545.

(s) *Burton v. Knowlton*, 3 Ves. 108. See *Brydges v. Phillips*, 6 Ves. 572.

(t) *Burton v. Knowlton*, 3 Ves. 107, 108, 110.

(u) *Webb v. Jones*, 1 Cox, 245, 2 Bro. C. C. 60, cited 2 Ball & B. 523.

(v) *Brydges v. Phillips*, 6 Ves. 570; *Tait v. Lord Northwick*, 4 Ves. 821, 823.

(w) *Brydges v. Phillips*, 6 Ves. 572; *Bootle v. Blundell*, 19 Ves. 522, 523, 527, 1 Mer. 217.

(x) *Walker v. Jackson*, 2 Atk. 626; *Brydges v. Phillips*, 6 Ves. 570.

(y) 3 Ves. 108, 4 Ves. 821, 823; *Bootle v. Blundell*, 1 Mer. 231, 239.

and on whom the funeral and testamentary expenses naturally fall, (z) but considerable where it is given to trustees, who are not also the executors. (a) In several cases, a testator's personal estate has been held not to be exonerated from the payment of his debts, although a devise of real estate, in trust to pay them, extended to pay his funeral and testamentary expenses also; and both where the trustees were, and where they were not, also the executors of the will. (b)

[*46] *With respect to inferences in general of the testator's intention, the conclusion to be drawn from the authorities, and to be most safely adopted in practice, seems to be, that the weight of an inference, to be taken from particular words or clauses in the will, is to be governed by the remaining parts of the will. This appears to be the opinion of Lord Eldon, who, in *Bootle v. Blundell*, after stating that a question of exemption is to be decided only by an examination of the whole will taken together, proceeds in these words:—"It must be by an examination of the entire will; for, if you take any one particular clause of those, which have been in other cases relied upon as a ground for inferring intention, it will be found that it is a ground for such inference, only so far as it can fairly be pronounced to be so upon reference to the general context. Take, for instance, the appointment of the same person to be trustee of the real estate, and executor; that has been called by some judges a circumstance, which shows the intention not to exempt the personal estate. I say, on the contrary, that, whether it is or is not such a circumstance, depends entirely upon the context. If I discover, from the beginning to the end of the will, an anxious discrimination between the two characters in which this person is to take under it; if I can trace a most extreme caution, that all their costs, sustained in the character of executors, are to be paid to them, not as executors, but as trustees of the real estate, then I must conclude, that, in the will so constituted, the inference of intention, arising out of the union of the two characters in the same individual, fails altogether, by reason of the stronger inference of a contrary intention. Again, some judges have considered a direction, that the funeral expenses shall be paid out of the real estate, a strong circumstance to exonerate the personal; for that it is not reasonable to suppose the testator could have meant to exempt it from that, which is the primary charge upon it, and yet to leave it subject, in all other respects, to the natural course of law; while others have professed not to see much in that argument, and that the circumstance goes no farther in meaning than it does in words, to create a fund for one particular class of expenditure. All these supposed positive inferences, then, amount [*47] to no more than this—that the same expressions, when used in one will, may have a totally different effect from what they would have in another." (c)

Not only the same words used in different wills, and united with different contexts, may, as is observed by Lord Eldon in the passage just transcribed, produce opposite effects; but the same word, in the same

(z) *Stephenson v. Heathcote*, 1 Eden, 38; *Burton v. Knowlton*, 3 Ves. 108; *Hartley v. Hurle*, 5 Ves. 540. See *Gray v. Minnethorpe*, 3 Ves. 103.

(a) *Burton v. Knowlton*, 3 Ves. 107, 108.

(b) *Stephenson v. Heathcote*, 1 Eden, 38; *Gray v. Minnethorpe*, 3 Ves. 103; *Hartley v. Hurle*, 5 Ves. 540; *McClelland v. Shaw*, 2 Sch. & Lef. 538.

(c) 1 Mer. 217.

will, may sometimes, in different minds, furnish contradictory inferences. In *Stephenson v. Heathcote*, the trust of the real estate devised was, "to raise so much money as would *fully* pay off and satisfy all the testator's debts and funeral expenses." In the mind of Lord Northington, who decided the case, the word '*fully*' weighed *against* the exemption of the personal estate: and, it seems, that in the mind of Lord Loughborough, the same word afforded an argument *for* such exemption. Lord Northington said, although the testator has given a power "to sell his real estate '*fully* to pay and satisfy his debts,' this is no more than making his real estate *auxiliary* to his personal. The word '*fully*' is of great force and effect; it is a word of reference, and shews the devise of the real estate was intended to be only *in aid*." And his Lordship added, I do not see any words in this will, which indicate an intention to exempt the personal estate; "on the contrary, the word '*fully*' is repugnant to any such intention." (d) Lord Loughborough's observation on the same word is,—"In *Stephenson v. Heathcote*, in the trust to sell so much of the real estate, as should be *fully* sufficient to satisfy the debts, &c., the word '*fully*' might have helped those, who contended for the exemption of the personal estate. It might be supposed to signify not partially." (e)

On the subject of exemption of personal estate, it remains to notice the case of *Waring v. Ward*. From this case it appears that if personal estate is bequeathed to A., who by the will is exempted from the payment of a part or the whole of the testator's debts, which exemption is created for the benefit of the particular legatee only, and not for the benefit of the estate generally, and A. dies in the testator's lifetime; the party who, by means of this **lapsed bequest*, becomes at the testator's death entitled to his personal estate, will not take it ex- [*48] empted from the testator's debts. (f)

SECTION VI.

RESPONSIBILITY OF A PURCHASER FROM THE TRUSTEES.

It is a distinction between debts specified and unspecified by the testator, that on a devise of real estate, in trust for the payment of debts generally, they not being specified by the testator, a purchaser from the trustees is not, although he has notice of the debts, bound to see his money applied in the payment of them. But if the debts, all or some of them, are specified, as in a schedule to the will, he is then obliged in equity to see his money applied in payment of such specified debts. (g)

When real estate is devised in trust for the payment of debts unspecified and legacies, a purchaser is not bound to see his money applied in the pay-

(d) 1 Eden. 45.

(e) 3 Ves. 106. See 19 Ves. 521.

(f) 5 Ves. 670.

(g) Anon. Mos. 96; *Elliot v. Merryman*, Barn. Ch. Rep. 78, 81; *Spalding v. Shalmer*, 1 Vern. 301, 303; *Abbot v. Gibbs*, 1 Eq. Cas. Abr. 358; *Lloyd v. Baldwin*, 1 Ves.

173; *Rogers v. Skillicorne*, Amb. 188; *Walker v. Flamstead*, 2 Kenyon, pt. 2, p. 57; *Williamson v. Curtis*, 3 Bro. C. C. 96; *Currer, or Comer, v. Walkley*, 2 Dick. 649, and from Reg. B. Sugd. Vend. & P. 6th ed. 512.

ment of either debts or legacies;(*h*) unless, perhaps, he is bound to see the legacies paid, if the sale takes place after the debts are, and are stated to be, satisfied.(*i*) If the trust is to pay legacies only, then how far the purchaser is bound to see his money applied in discharge of the legacies is by Mr. Butler said to be "often a subject of discussion and doubt, even with the most experienced practitioners."(*j*) Lord Hardwicke has said, "If an estate is devised, subject to particular legacies, and nothing else, a purchaser must see those legacies discharged."(*k*) And Lord [*49] Thurlow has held that, "where the *estate is to be sold, and a specific sum, as 5*l.*, to be paid to A., the purchaser must see to the application."(*l*) These authorities seem to constitute a general rule, that where the trust is to pay legacies only, a purchaser is bound to see his money applied in the payment of them.

On a devise of a real estate, in trust for the payment of debts, specified or unspecified, or in trust for the payment of debts and legacies, a purchaser is not, it appears, obliged to see that no more of the estate is sold, than is required for the payment of the debts, or debts and legacies.(*m*)

The general opinion of the profession appears to be, if real estate, devised for the payment of debts, specified or unspecified, or for the payment of debts and legacies, is devised in trust, to raise as much money as the personal estate shall fall or prove deficient in paying the testator's debts, or debts and legacies, that this trust does not create a condition precedent, which invalidates a purchase, if the personal estate is sufficient to pay the debts, or debts and legacies; and that a purchaser from the trustees is not bound to inquire if the personal estate is deficient, or the real estate is wanted or not.(*n*) An important distinction seems, however, to exist between such a *devise*, and a *bare power*, a power given to sell for the purpose of raising as much money as the personal estate shall fall short in paying. Such terms of a *power* create, it seems, a condition precedent, which, if not complied with, will invalidate a sale under the power.(*o*) "To the valid execution of such a power," says Mr. Butler, "the deficiency of the personal estate seems to be a requisite circumstance. It may, therefore, be contended, that if there be not the deficiency in question, the power is not well executed; and a necessary consequence of this appears to be, that if the purchaser cannot give legal [*50] evidence of this deficiency, he cannot make out *his title under the power."(*p*) And on the same power Sir E. Sugden remarks, that "as the power is not well executed, unless there be a deficiency, a purchaser must at his peril ascertain the fact, notwithstanding that the trust be for payment of debts generally; or being for pay-

(*h*) Rogers v. Skillikorne, Amb. 188; Walker v. Flamstead, 2 Kenyon, pt. 2, p. 57; Smith v. Guyon, 1 Bro. C. C. 186; Jebb v. Abbott, and Beynon v. Collins, cited Butl. Co. Litt. 18th ed. 290 b. n. (1) XIV. 3. See also Omerod v. Hardman, 5 Ves. 722, cited 6 Ves. 654, n.

(*i*) See 2 Prest. Ab. 222.

(*j*) Butl. Co. Litt. 18th ed. 290 b. n. (1) XIV. 3.

(*k*) 2 Kenyon, pt. 2, p. 58.

(*l*) Smith v. Guyon, 1 Bro. C. C. 186.

(*m*) Spalding v. Shalmer, 1 Vern. 301, 303.

(*n*) Butl. Co. Litt. 18th ed. 290 b. n. (1) XIV. 4; Sugd. Vend. & P. 6th ed. 513.

(*o*) Dike v. Ricks, or Ricke, Cro. Car. 335, 1 Rol. Abr. 329. pl. 9; Culpepper v. Aston, or Austin, 2 Ch. Cas. 115, 221. See also Popham v. Hobert, 1 Ch. Cas. 280, and Bowman v. Mathews, For. Excheq. Rep. 163.

(*p*) Butl. Co. Litt. 18th ed. 290 b. n. (1) XIV. 4.

ment of particular debts or legacies, the *common* clause, that the trustees' receipts shall be sufficient discharges, be inserted in the instrument creating the trust."(*g*) In *Dike v. Ricks*, a will contained a power to E. the executrix, "that if it should fully and sufficiently appear, that the said E. should not find sufficient of the goods, chattels, and debts due to the said J., the testator, to satisfy his debts, that then she should sell all the said tenement, or so much as, with his goods and debts owing him, would satisfy his debts." The executrix, it appears, sold the whole tenement; and it seems that the Court was of opinion, that the terms of the power created a condition precedent, which made the validity of the sale of the *whole* tenement depend, "on the value of the goods and debts due to the testator, and what was the sum of debts which he owed, and what was the value of the lands sold, for she had authority only to sell as much as should suffice, &c."(*r*) This case is an authority, that, under a power of the like nature, a purchaser is bound, not only to inquire if the personal estate is deficient, but to see that no more of the land is sold than is necessary to make up the deficiency of the personal estate.

SECTION VII.

REVIVING SIMPLE CONTRACT DEBTS BARRED BY THE STATUTE OF LIMITATIONS.

A DEVISE of real estate, in trust for the payment of debts, or a charge of debts on real estate, revives a simple contract debt created within six years before the testator's death, and, by the completion of the six years after his death, barred by the Statute *of Limitations, 21 [*51] James I., c. 16.(*s*) But in opposition to former authorities [*51] and opinions,(*t*) in agreement, however, with the decision in *Legastick v. Cowne*,(*u*) and with the sentiments and opinions of Lord Hardwicke,(*v*) Lord Alvanley,(*w*) Lord Kenyon,(*x*) Lord Redesdale,(*y*) and Lord Eldon,(*z*) it was by Sir T. Plumer, in *Burke v. Jones*, decided, that a devise of real estate, as lands of inheritance, in trust for the payment of debts, will not of itself revive a simple contract debt, at the testator's death barred by the Statute of Limitations.(*a*) Notwithstanding

(*g*) Sugd. Vend. & P. 6th ed. 515.

(*r*) Cro. Car. 335.

(*s*) *Vaughan v. Guy*, Mos. 245, cited 2 Ves. & B. 285; *Staggers v. Welby*, cited 2 P. W. 374, 375, and from the Reg. B. 2 Ves. & B. 282; *Executors of Fergus v. Gore*, 1 Sch. & Lef. 107; *Burke v. Jones*, 2 Ves. & B. 280, 281, 288; *Morse v. Langham*, cited ib. 286; *Hargreaves v. Michell*, 6 Madd. 326; *Hughes v. Wynne*, 1 Turn. & R. 307.

(*t*) *Anon.* 1 Salk. 154; *Andrews v. Brown*, Pres. Ch. 385; *Blakeway*, or *Blackway*, v. *Earl of Strafford*, 2 P. W. 373, Sel. Ca. Ch.

57, 1 Dick, 48, 6 Br. P. C. ed. Tolm. 630; *Jones v. Earl of Strafford*, 3 P. W. 79, 84, 89; *Trueman v. Fenton*, Cowp. 548. See also *Vaughan v. Guy*, 1 Barnard. 271, and *Ketilby v. Ketilby*, cited 2 Anstr. 527, and 2 Ves. & B. 288.

(*u*) Mos. 391.

(*v*) *Oughterlony v. Earl Powis*, Amb. 321; *Lacon v. Briggs*, 3 Atk. 107.

(*w*) 15 Ves. 488.

(*x*) Ibid.

(*y*) 1 Sch. & Lef. 109, 110.

(*z*) *Ex parte Dewdney*, 15 Ves. 497.

(*a*) 2 Ves. & B. 275, cited 19 Ves. 470.

such devise, the debt will, after the death of the testator, continue, by reason of the statute, to be barred and irrecoverable, unless there are other words in the will, from which an intention can be collected, that the testator meant such barred debt to be paid by the trustees.(b)

The statute of James I. does not fix any limitation to a bond debt. But a jury is often recommended to presume payment of a bond, where, from circumstances, as the lapse of twenty years, without any demand of interest or principal, there is a reasonable ground to conclude the debt has been discharged.(c) In *Newman v. Newman*, an action of debt on a bond, and where the obligor had from 1792 up to the time of the action brought, 1815, resided in America, the Court was of opinion that payment was not to be presumed from lapse of time.(d) In several [*52] cases a Court of *Equity has presumed a bond to be satisfied, and accordingly decreed it to be cancelled.(e)

Presumption of payment of a bond may be met by evidence to satisfy a jury that the debtor had not the opportunity or the means of paying: and where evidence to repel the presumption exists, a Court of Equity will direct an action or issue on the facts.(f)

A direction by will for the payment of debts will not, it seems, revive a bond debt.(g) On the revival of a simple contract debt, and a distinction between this kind of debt and one by bond, Lord Eldon has made the following observations:—"Courts of Equity, anxiously careful that no debt, which ought to be paid, should remain unpaid, have applied a limitation of their own to cases where it was not given by the legislature. The old decisions, which I observe the Vice-chancellor thinks ought not to stand,(h) went to this extent; that, if a man by his will directed his debts to be paid, that took away the plea of the Statute of Limitations; and this Court, with the view that no debt should go unpaid, construed that to mean every debt, that once existed. Upon this subject, there is this distinction between debts on simple contract and bond. The principle with regard to the former is, that the debt may have existence, and the remedy be taken away; but the bond debt goes upon the presumption of payment; and the pleading is quite different. In the former case, the plea is *non assumpsit*, or *non assumpsit infra sex annos*; which does not negative the existence of the debt, even after the six years: but to a bond, the plea is *solvit ad diem*, or *solvit post diem*; and the time is evidence of the actual discharge. I remember Sir Thomas Sewell's opinion, that a direction by will for the payment of debts revived a bond: but Lord Thurlow thought that would not do; as the presumption from non-payment of interest was, that the debt was paid; and the direction in the will applied to debts, which might be supposed to [*53] exist, although the *remedy was taken away: but such direction could not be applied to a bond, where payment is presumed."(i)

In the case of judgments, as well as bonds, it appears payment may be

(b) *Gofton v. Mills*, Prec. Ch. 9, 2 Vern. 141; *Andrews v. Brown*, Prec. Ch. 385, cited 2 Ves. & B. 283. Geoffrey v. Thorn, ib. 88; *Dennis v. Nourse*, ib. 106.

(c) *Shellito v. Horsefall*, Clayt. 102; *Oswald v. Legh*, 1 Durn. & E. 270.

(d) 1 Stark. 101.

(e) *Carpenter v. Tucker*, 1 Ch. Rep. 78;

(f) *Fladong v. Winter*, 19 Ves. 196; and *Wynne v. Waring*, there cited.

(g) 2 Ves. & B. 470.

(h) *Burke v. Jones*, 2 Ves. & B. 275.

(i) 19 Ves. 470.

presumed; as in an instance where a judgment was above twenty years standing.(j)

SECTION VIII.

MISCELLANEOUS POINTS OF THE GENERAL SUBJECT.

A PERSON devised certain real estates to trustees, who were also the executors of the will, in trust to sell and to discharge certain incumbrances. The overplus of the money arising by the sale was, on the intention, held to be charged by the testator with the payment of his simple contract debts.(k) Where a person devised all his real and personal estate to trustees, and their heirs, &c., in trust by application, sale, or mortgage thereof, to pay thereout whatsoever he should thereafter by will or codicil appoint, and then appointed the trustees executors of his will, and directed that his debts should be paid by his executors; the will was held to authorize a sale of the real estate for the payment of debts; although it was contended, that the direction being for the payment of debts by the executors, this showed that the intention of the testator was, to confine it to payment out of the personal estate. In making this decision, Sir W. Grant said,—“The testator has given his real estate to certain persons, whom he also appoints executors of his will, upon trust to sell for such purposes as he shall afterwards appoint; and then directs his debts to be paid by his executors. In a late case of the same kind, I held that such a direction authorized a sale for the payment of debts; and I continue of that opinion.” His Honor accordingly decreed a specific performance of a contract to purchase from the executors a part of the real estate.(l) A *person, who had during his infancy borrowed 130*l.* to buy, and therewith bought, necessities, de- [*54]vised his real estate to trustees for the payment of his debts, with interest; and it was held, that this money lent to the testator, although during his infancy, was within the trust, and ought to be paid.(m) In *Verney v. Verney*, a will contained this devise;—I give my estate at O., chargeable nevertheless with my debts, to my wife for life; with remainders over. But by a codicil, the testator devised all his lands, tenements, &c., which he held in fee simple in Great Britain, to H., his heirs and assigns, upon trust, by mortgage or sale thereof, to raise such money as should be necessary for the more easy and effectual payment of his debts. A question was made, whether the codicil did not amount in equity to a revocation of the devise in the will, as to the estate at O. The Court declared, that the codicil was, in equity, a revocation of the devise, so far only as to enable H., the trustee, to mortgage or sell the same, to raise money for payment of the testator’s debts; and that the surplus thereof passed by the devises in the will.(n) An anonymous case is thus stated:—“A man devised his debts to be paid out of his real and personal estates; the exe-

(j) *Curtis v. Fitzpatrick*, 2 Peaks Rep. 92; *Flower v. Earl of Bolingbroke*, 1 Stra. 639.

(k) *Kidney v. Cousmaker*, 1 Ves. jun. 436, 2 Ves. jun. 267, 7 Bro. P. C. ed. Toml. 573.

(l) *Barker v. Duke of Devonshire*, 3 Mer. 310.

(m) *Marlow v. Pitfeild*, 1 P. W. 558.

(n) *Belt’s Supplem. to Ves. sen.*, 189, 2nd ed. 200.

utor paid more than his personal estate; he shall be reimbursed out of the real estate.”(o) T. W. devised, subject to his debts, all his property real and personal, to his widow. J. W., the father of T. W., by his will gave an annuity for her life to the widow of T. W., and made the son of T. W. his residuary devisee and legatee. The estate of T. W. was insufficient for the payment of his debts; and J. W., by a codicil to his will, directed his trustees and executors to pay the debts of T. W. The true construction of the father’s will was decided to be, that, by the direction to pay his son’s debts, he intended only the payment of such part as, after the due application of the son’s estate, should remain unsatisfied.(p) A person devised real estates, in trust to sell for payment of his debts; and subject thereto, he gave the same estates to F. for life, without impeachment of waste, with remainder to her first and [*55] other sons *in tail. The trustees sold part only of the estates, and cut down and sold timber and other wood on other parts of the estates, and applied the proceeds in payment of the debts. It was decided, that “by the act of the trustee, the wood and timber, which would have belonged to the tenant for life, have been applied in relieving the inheritance from a burthen, to which it was subjected by the testator. And therefore the tenant for life is entitled to a charge on the inheritance, for the sum for which the timber and other wood were sold.”(q)

[*56]

*CHAPTER IV.

OF A CHARGE OF DEBTS, OR DEBTS AND LEGACIES ON REAL ESTATE.

SECT. I. *The Trust created by a Charge.*II. *Wills in which Real Estate has been held to be charged with the payment of Debts, or Debts and Legacies.*III. *Wills in which Real Estate has been held not to be charged with the payment of Debts, or Debts and Legacies.*IV. *Copyholds charged.*V. *Exemption of the Testator’s personal Estate.*VI. *Responsibility of a Purchaser.*VII. *Miscellaneous Points of the general Subject.*

SECTION I.

THE TRUST CREATED BY A CHARGE.

LAND is frequently devised, in trust for the payment of debts, or debts and legacies; and is as often charged with the payment of them. A difference between a devise and charge seems to be, that, on a devise, the will expressly creates a trust for the payment intended; and where a

(o) 2 Ch. Cas. 109.

(p) Walker v. Lodge, 3 Russ. 459.

(q) Davies v. Wescomb, 2 Sim. 425

charge only is created, a trust for payment is not *expressed* in the will, but is, in a Court of Equity, *implied* in the charge.(a)

The land charged sometimes descends to the testator's heir at law,(b) and is more frequently devised by the will. And equity [*57] *fastens on the land a trust, available against the heir if the land descends, and against the devisee if it is devised.(c)

If the will charges the land with either debts, or debts and legacies, a Court of Equity will, if a mortgage or sale of the estate is necessary for the payment of them, accordingly decree a mortgage or sale for the purpose.(d)

SECTION II.

WILLS IN WHICH REAL ESTATE HAS BEEN HELD TO BE CHARGED WITH THE PAYMENT OF DEBTS, OR DEBTS AND LEGACIES.

THE language of a will is often too clear to admit a doubt, if real estate is or is not charged with the payment of debts, or debts and legacies. But in many instances this clearness is wanting; and the question is then raised if debts, or debts and legacies, are by the will charged on the real estate. The fact that they are, or are not, so charged, depends on the intention, which, on an examination of the whole will, is to be collected from it.(e)

Where this inquiry has been occasioned, land, copyhold at the will of the lord,(f) customary,(g) and freehold, has been held to be charged, in many instances, with debts,(h) and in *other instances with debts and legacies.(i) In *Alexander v. Holland*, a debt was [*58]

(d) *Clarke v. Smith*, 1 Lutw. 793, 797, 798; *Elliot v. Merryman*, Barn. Ch. Rep. 78; *Silk v. Prime*, 1 Bro. C. C. 138, n.; *Bailey v. Ekins*, 7 Ves. 323.

(b) *Freemoult v. Dedire*, 1 P. W. 429; *Young v. Darnet*, 2 Dick. 452; *Hargrave v. Tindal*, 1 Bro. C. C. 136, n.; *Bailey v. Ekins*, 7 Ves. 223: See also *Clarke v. Smith*, 1 Lutw. 793, 797, Com. 72.

(c) See, besides the authorities in the last note, *Shallcross v. Finden*, 3 Ves. 739.

(d) *Hughs v. Collis*, 1 Ch. Cas. 179; *Stubbs v. Stubbs*, Cas. T. Finch, 415; *Newman v. Johnson*, 1 Vern. 45; *Clowdsley v. Pelham*, ib. 411; *Berry v. Askham*, 2 Vern. 26; *Wareham v. Brown*, ib. 153; *Harris v. Ingledew*, 3 P. W. 91; *Anon. ib.* 363, n.A.; *Elliot v. Merriman*, 3 Atk. 41; *Finch v. Hattersley*, 3 Russell, 345, n. See also *Green v. Belchier*, 1 Atk. 506.

(e) *Thomas v. Britnell*, 2 Ves. 313; *Noel v. Weston*, 2 Ves. & B. 269; and see 1 W. Bl. Rep. 544.

(f) *Newman v. Johnson*, 1 Vern. 45; *Stanger v. Tryon*, 2 Vern. 3d ed. 709, n.(3); *Harris v. Ingledew*, 3 P. W. 91; *Tudor v. Anson*, 2 Ves. 582; *Car v. Ellison*, 3 Atk. 73, 76; *Coombes v. Gibson*, 1 Bro. C. C. 273; *Kentish v. Kentish*, 3 Bro. C. C. 257;

Growcock v. Smith, 2 Cox, 397; *Pennington v. Pennington*, 1 Ves. & B. 406; *Noel v. Weston*, 2 Ves. & B. 269; *Rowley v. Eytton*, 2 Mer. 128; *Ronalds v. Feltham*, 1 Turn. & R. 418.

(g) *Earl of Godolphin v. Penneck*, 2 Ves. 271.

(h) *Stubbs v. Stubbs*, Cas. T. Finch, 415; *Clowdsley v. Pelham*, 1 Vern. 411, cited, and said to be affirmed in H. L., Nels. Rep. 178, and 2 Vern. 229; *Kay v. Townsend*, 2 Vern. 3d ed. 709, n.(2); *Foster v. Cook*, 3 Bro. C. C. 347; *Bradford v. Foley*, ib. 351, n. See also *Webb v. Webb*, Barn. Ch. Rep. 89; *Anon.* 2 Freem. 192; *Thomas v. Britnell*, 2 Ves. 313; *Clarke v. Sewell*, 3 Atk. 96, 100; *Muddle v. Fry*, 6 Madd. 270; and see, farther, the cases on other points cited in the course of this section.

(i) *Hughs v. Collis*, 1 Ch. Cas. 179; *Wareham v. Brown*, 2 Vern. 153; *Dolman v. Smith*, or *Weston*, 2 Vern. 740, Prec. Ch. 456, 1 Dick. 26; *Lumley v. May*, Prec. Ch. 37; *Astley v. Powis*, 1 Ves. 483, 495; *Ellison v. Airey*, 2 Ves. 568; *Bridgman v. Dove*, 3 Atk. 201; *Williams v. Bishop of Landaff*, 1 Cox, 254; *Coxe v. Bassett*, 3 Ves. 155; *Stapleton v. Stapleton*, 2 Ball & B. 523.

held to be charged on the testator's copyhold only, and not on his freehold land.^(j)

Some additional cases claim more particular notice, as the terms of the wills, and the construction put on them, seem to constitute precedents of ready practical application on interpreting future wills of the same kind.

A charge, then, of debts on real estate, after in the will devised, has been held to be created by the following words:—

“As for my lands, tenements, goods, and chattels, I give and bequeath as followeth: After my debts paid, to my five daughters 100*l.* a-piece. Also I give to my wife, whom I make my executrix, all the rest of my lands and tenements, goods and chattels.”^(k)

“My debts and legacies being first deducted, I devise all my estate both real and personal, to A.”^(l)

“As to all my worldly estate, my debts being first satisfied, I devise the same as follows.”^(m)

“As for my worldly goods, with which it hath pleased God to bless me, after my debts paid, and funeral expenses discharged, I dispose thereof as follows.”⁽ⁿ⁾

“After payment of all my just debts, funeral expenses, and the expenses of the probate hereof, I give,” &c.^(o)

[*59] “As to my temporal estate, I give and dispose thereof as followeth. First I will that all my debts be justly paid: Also I devise all my estate in G. to A.”^(p)

“Imprimis, I will and devise that all my debts, legacies, and funeral, shall be paid and satisfied in the first place. Item, I give and devise,” &c.^(q)

“I do by this my will dispose of such worldly estate as it hath pleased God to bestow upon me. First, I will that all my debts be paid and discharged; and, out of the remainder of my estate, I give and bequeath unto my wife 300*l.* My mind and will is, that my wife have one moiety of what is left after my debts paid.”^(r)

“As to my worldly estate, which it hath pleased God to bestow upon me, I give and dispose thereof in manner following; that is to say, Imprimis, I will that all the debts, which I shall owe at the time of my decease, be discharged and paid. Item” I give, devise, and bequeath, &c.^(s)

(j) 2 Kenyon, pt. 2, p. 4.

(k) Hughes v. Collis, cited 1 Ch. Cas. 179.

(l) Newman v. Johnson, 1 Vern. 45.

(m) Harris v. Ingledew, 3 P. W. 91.

(n) Hill v. Bishop of London, 1 Atk. 618, 621. See also on the words “worldly goods,” Miles v. Leigh, 1 West Cas. T. Hardw. 710.

(o) Shallcross v. Finden, 3 Ves. 738. See also King v. King, 3 P. W. 358; Tompkins v. Tompkins, Prec. Ch. 397; and Kidney v. Coussemaker, 1 Ves. jun. 440.

(p) Bowdler v. Smith, Prec. Ch. 264.

(q) Trott v. Vernon, Prec. Ch. 430, 1 Eq. Cas. Abr. 198, 2 Vern. 708, Gilb. Eq. Rep. 111.

(r) Beachcroft v. Beachcroft, 2 Vern. 690.

(s) Legh v. The Earl of Warrington, 1 Bro. P. C. ed. Toml. 511, cited 2 Ves. 272, 314, and stated from MS. in Belt's Supplement to Ves. sen. 341, 2d ed. 361; Lord Warrington v. Leigh, or Lee, S. C., 2 Eq. Cas. Abr. 372, Ca. 19, Sel. Ca. Ch. 39. In Mr. Belt's MS. note of this case the will says, “As to my worldly estate, &c., I will, &c., be discharged and paid out of my worldly estate.” If, however, after the words “discharged and paid” followed, in the will, the words “out of my worldly estate,” there would, it is certain, be an express charge on the testator's real estate (Beachcroft v. Beachcroft, 2 Vern. 690; Clark v. Sewell, 3 Atk. 96, 100; Aw-

"As to the worldly estate with which it hath pleased God to bless me, I give, devise, and dispose thereof as fol- [*60] loweth: Imprimis, I will that the charges of my funeral, and all debts which shall be owing by me at the time of my death, be justly paid and satisfied. And I will that all my debts be discharged within one year after my decease, or so soon after as can possibly be performed."(*t*)

"I will that my debts and funeral expenses be first paid and discharged."(*u*)

"I will that all my just debts and funeral expenses be paid and satisfied."(*v*)

"In the first place I will that all my just debts and funeral expenses be fully paid and satisfied."(*w*)

"First I will that all my just debts shall be in the first place paid and satisfied."(*x*)

"First I will and direct that all my legal debts, legacies, and funeral expenses, shall be fully paid and discharged."(*y*)

"I will and direct that my just debts, funeral and testamentary expenses, be paid and satisfied."(*z*)

"First I direct all my just debts and funeral expenses to be fully paid and satisfied."(*a*)

"First I will that all my debts, to the value of 20s. in the *pound, and my funeral expenses, shall be paid by my [*61] executrix hereinafter named."(*b*)

"First I will and direct that all my just debts and funeral expenses be fully paid and satisfied by my executor hereinafter named."(*c*)

In these examples of a charge on real estate, after in the will devised, two kinds of charge occur; one, where the will omits to mention the

Irby v. Middleton, 4 Vin. Abr. 460, 2 Eq. Cas. Abr. 497, Ca. 16.) But it is observable that, on the appeal to the House of Lords, no part of the argument of counsel turned on the construction of the words "worldly estate" in the expression "out of my worldly estate." And Lord Hardwicke, who, in 2 Ves. 272, cites the case in question, not from Bro. P. C., but probably from a MS., clearly makes the decision depend, not on a meaning of "worldly estate," in the words "out of my worldly estate," but on the effect of the introductory clause, interpreted by Lord King in the Court of Chancery, and by the House of Lords, to run over the whole will. These circumstances alone might perhaps establish, beyond all doubt, the accuracy of the report in Bro. P. C., and of the short note in 2 Eq. Cas. Abr., and, with reference to the same words, also the report in Sel. Ca. Ch. As, however, the case of *Legh v. The Earl of Warrington* is cited on all occasions, and is confessedly the leading authority on the subject, and in a late case was cited by counsel from Mr. Bell's MS. note (*Clifford v. Lewis*, 6 Madd. 37,) the difference between the reports and that MS. appeared to be of sufficient importance, to lead to an examination of the will, at Doctor's Commons. The author is accordingly able to state, that he has there

read the original will of Mr. Langham Booth, the testator in the suit, and that the words of the clause in question are,—As to my worldly estate, which it hath pleased God to Bestow upon me, I give and dispose thereof in manner following; that is to say, "Imprimis I will that all the debts, which I shall owe at the time of my decease, be discharged and paid." Then immediately follows the word "Item," introductory to the devise of the annuity to Mary Saxon. The report in Bro. P. C. is therefore correct, with the unimportant exception of the words "my debts," the expression in the will being "the debts."

(*t*) *Hatton v. Nichol*, Cas. T. Talb. 110.

(*u*) *Colley v. Mickleston*, cited 3 Ves. 582; *Williams v. Chitty*, 3 Ves. 545.

(*v*) *Tudor v. Anson*, 2 Ves. 582.

(*w*) *Stanger v. Tryon*, 2 Vern. 3d ed. 709, n.

(*x*) *Kentish v. Kentish*, 3 Bro. C. C. 267.

(*y*) *Kightley v. Kightley*, 2 Ves. jun. 328, 330.

(*z*) *Clifford v. Lewis*, 6 Madd. 33.

(*a*) *Ronalds v. Feltham*, 1 Turn. & R. 418.

(*b*) *Finch v. Hattersley*, cited 7 Ves. 210, 211, and stated from Reg. B. 3 Russell, 345, n.

(*c*) *Henvell v. Whitaker*, 3 Russell, 343.

party by whom the debts are to be paid; and the other, where it is said they are to be paid by the executor.

And it appears that where the will omits to mention the party, by whom the debts are to be paid, an intention to charge may be inferred—1. from the circumstance, that personal estate needs not an expressed intention to make it liable to debts;(d) and 2. from the circumstance, that the testator minded to pay his debts, and also to devise real estate, before such devise uses these, or the like words,—“As to all my worldly estate, my debts being first satisfied,” I devise, &c.; or, “Imprimis, I will and devise that all my debts, legacies, and funeral, shall be paid and satisfied in the first place;” or, “First I direct all my just debts and funeral expenses to be fully paid and satisfied;”—and by these, or the like words, expresses an intention, not only to benefit his creditors, but to give them a preference before the devisee; and, to this end, first to secure payment to his creditors, and then, but not until then, to make the real estate profitable to the devisee.(e)

And it is observable that when, before the devise of the real estate, a will contains the following, or the like expression, “I will and direct that my just debts, funeral and testamentary expenses, be paid and satisfied;” these words, although they do not *express* that the debts are to be paid *first*, or, *in the first place*, are yet interpreted to mean the same, [*62] as if the form of expression *expressly included those words “first,” or “in the first place,” and are accordingly construed equally to denote the testator’s intention to prefer his creditors before the devisee of his real estate.(f)

It farther appears, that where it is said in the will that the debts are to be paid by the executor, an intention to charge debts on real estate devised, may be inferred,—1. from the circumstance, that personal estate needs not an expressed intention to make it liable to debts; and 2. from the circumstance, that the testator wills that his debts shall be paid by his executor (although described by the word executor,) and devises beneficially to his executor real estate;(g) or from the circumstances, that the testator devises beneficially to his executor real estate, and minded to pay his debts, and that they shall be paid by his executor, uses these, or the like words:—“First I will that all my debts shall be paid by my executor,”—and by these, or the like words, expresses an intention, not only to benefit his creditors, but to give them a preference before the devisee; and, to this end, first to secure payment to his creditors, and then, but not until then, to make the real estate profitable to the executor, to whom it is devised.(h)

The will and decision in *Eggh v. Earl of Warrington* appear to be the express ground, on which Lord Hardwicke decided the case of *Earl of Godolphin v. Penneck*. In this case, F. P. by his will declared, he would make a disposition of his whole estate and effects. The first dis-

(d) *Shallcross v. Finden*, 3 Ves. 789.

(e) *Trott v. Vernon*, Prec. Ch. 430. 2 Vern. 708; *Harris v. Ingledew*, 3 P. W. 91, 96; *Shallcross v. Finden*, 3 Ves. 738; *Ronalds v. Feltham*, 1 Turn. & R. 418.

(f) *Clifford v. Lewis*, 6 Madd. 33; *Tudor v. Anson*, 2 Ves. 582.

(g) *Finch v. Hattersley*, 3 Russell, 345, n., and cited 7 Ves. 210; *Henvell v. Whit-*

aker, 3 Russell, 343. See also *Aubrey v. Middleton*, 4 Vin. Abr. 460, 2 Eq. Cas. Abr. 497, Ca. 16; *Alcock v. Sparhawk*, 2 Vern. 228; and *Attorney General v. Moor*, 1 West Cas. T. Hardw. 102.

(h) *Trott v. Vernon*, Prec. Ch. 430. *Finch v. Hattersley*, 3 Russell, 354, n., cited 7 Ves. 210; *Henvell v. Whitaker*, 3 Russell 343.

position was, that all his debts and funeral charges should be first paid and satisfied. Then he devised the particular parts of his estate, subject thereto, among particular persons. The question was, whether certain customary lands, held of the manor part of the duchy of Cornwall, which had been mentioned in the will in distinct parts from [*63] the "rest of the fee simple lands, were subject to debts, the testator having surrendered those lands to B. P., who declared a trust thereof by deed for several persons, and for the use of such as testator should appoint. By Lord Hardwicke.—"I am satisfied that by the will these lands are subject to debts. All the lands, and every part of them devised, are made subject to debts. Here the first disposition runs over all the subsequent clauses in this will. That was the construction made by Lord King, in *Leigh v. Earl of Warwick*,⁽ⁱ⁾ affirmed in the House of Lords; though there were strong words against its running over the whole: for though the testator there had used these general words here, yet afterward, in devising the particular parts, he had devised them subject to debts; and the question was, whether those other parts, not so devised, should be by the first clause subject; and it was determined by that general clause to affect the whole, notwithstanding the particular devises: that therefore was stronger; and in this I am of opinion the intent was, that every thing the testator gave by his will should be subject to his debts. Consequently, the trust of the lands must be subject as well as the rest, notwithstanding these are mentioned in distinct parts, agreeable to that case on the will of ——— Booth before Lord King."^(j)

Earl of Godolphin v. Penneck appears to be an authority, that although a part of a testator's real estate is devised expressly subject to debts, a general introductory clause may also charge with the payment of them, other real estate devised, but not by the will expressly charged with the payment of debts.^(k)

(i) Undoubtedly the case meant is, *Leigh v. Earl of Warrington*, 1 Bro. P. C. ed. Toml. 511, on the will of Langham Booth.

(j) 2 Ves. 271; cited 3 Ves. 552, where Lord Loughborough says he directed a search for the will in *Lord Godolphin v. Penneck*, but it could not be found. In the Reg. B. 1750, A. fo. 404 b, and 405, it appears that the will of Francis Penneck is dated 6th March, 1722, and that he died about that time.

(k) *Earl of Godolphin v. Penneck* may be an authority for this point, although the interpretation of the will in *Leigh v. Earl of Warrington*, as that case is cited by Lord Hardwicke in the report of the judgment above transcribed, may not be the right interpretation of it. If it may be allowed to doubt the correctness of the construction there put on Mr. Booth's Will, it may be thought to be an error to say, that the testator "afterward, in devising the particular parts, devised them subject to debts." On an examination of the will, it appears that, after the introductory clause, the first disposition is of an annuity or rent of 100*l.*, which the testator

devises to M. S. for her life, and charges on his manor of Thornton, and other lands in the parish of Thornton, with a clause of entry and distress on non-payment. Immediately after this clause the will proceeds, "Item all the said manor, &c., subject to the payment of the said rent as aforesaid, and charged and chargeable *therewith*, I give and devise," &c. Here follow a devise to Henry Booth for life, and numerous other limitations, to the greater part of which are added the words, "charged and chargeable as aforesaid." The will contains a power to Henry Booth to create jointure out of the same lands; and this power is given expressly, "subject to the payment of the said rent as aforesaid." Besides the estates charged with that annuity, other real estate, not charged with it, is devised; and in this devise the limitations are made without the words "charged and chargeable as aforesaid," or any other words of reference to a charge in the will. These words, "charged and chargeable as aforesaid," added to the limitations of the lands charged with the annuity given to M. S., refer, it is imagined, exclusively to that annuity; and, unless

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*SECTION III.

WILLS IN WHICH REAL ESTATE HAS BEEN HELD NOT TO BE CHARGED
WITH THE PAYMENT OF DEBTS, OR DEBTS AND LEGACIES.

LAND, copyhold, *(l)* and freehold, has in several cases been held *not* to be by a will charged with the debts of the testator. *(m)* As each decision here referred to turned on the language of the whole will, and the terms of each will may not, all of them, admit of ready practical application in future cases, a statement of those wills may here be omitted. This general proposition, to be extracted from them, may, however, here be introduced; namely, that if the testator expresses his will to be, that his debts shall be paid by his executor, as if he says,—“Imprimis, I will [*65] that all *such debts as I shall justly owe at the time of my decease, and my funeral charges and expenses be in the first place paid by my executor hereinafter named;” or, “Imprimis I will and direct that all my just debts and funeral expenses be paid and discharged, as soon as conveniently may be after my decease, by my executor hereinafter named;” or, “I will that all my just debts and funeral expenses may be satisfied and paid by my executor, as soon after my decease as may be;”—and the testator does not devise real estate to the executor, that expression of intention to pay his debts is construed to apply to personal property only, and is not sufficient to charge with the payment of debts real estate devised by the will to another person. *(n)*

SECTION IV.

COPYHOLDS CHARGED.

BEFORE the statute 55 Geo. III. c. 192, if copyholds were expressly devised, *(o)* or devised by a general description not satisfied by freehold lands of the testator, *(p)* and such copyholds were either expressly, or under general words, *(q)* charged by the will with the payment of debts,

these words can be construed to refer to the introductory clause in the will, there is not, beyond that introduction, a single syllable about debts, either in the will, or in the two codicils annexed to it.

(l) Byas v. Byas, 2 Ves. 164.

(m) Anon. 2 Freem. 192, Ca. 269 b.; Barton v. Wilcocks, 4 Vin. Abr. 463, 2 Eq. Cas. Abr. 499; Parker v. Wilcox, 8 Vin. Abr. 439, 2 Eq. Cas. Abr. 371; Eyles v. Cary, 1 Vern. 457; Thomas v. Britnell, 2 Ves. 313; Brydges, or Bridgen, v. Landen, or Lander, cited 3 Ves. 550, and 7 Ves. 210, 211, and stated from Reg. B. 3 Russ. 346, n.; Keeling v. Brown, 5 Ves. 359; Powell v. Robins, 7 Ves. 309; Willan v. Lancaster, 3 Russ. 108. See also Sanderson v. Wharton, 8 Price, 680.

Anon. 2 Freem. 192 seems to be overruled by Clifford v. Lewis, 6 Madd. 33. On Eyles v. Cary, there is this marginal note in 1 Eq. Cas. Abr. 198,—“This is a strong case. I question if it would now be so decreed. *Per* Verney, M. R., in the case of Mallison and Middleton, Aug. 2, 1739.”

(n) Bridgen v. Lander, 3 Russ. 346, n.; Keeling v. Brown, 5 Ves. 359; Powell v. Robins, 7 Ves. 309; Willan v. Lancaster, 3 Russ. 108.

(o) Harris v. Ingledew, 3 P. W. 91.

(p) Ithell v. Beane, 1 Ves. 215; Tudor v. Anson, 2 Ves. 582.

(q) Harris v. Ingledew, 3 P. W. 91; Tudor v. Anson, 2 Ves. 582.

and there was not a surrender to the use of the will, a Court of Equity supplied the surrender for the benefit of the creditors.^(r)

Before the same statute, in the case of *Harris v. Ingledew*, where copyholds were expressly devised to one person, and by the same will, freehold lands were devised to other persons, and, by the general description of "worldly estate," the copyhold, as well as freehold, was charged with the payment of the testator's debts, and the copyhold was not surrendered to the use of the will, and, in consequence, descended to the testator's heir, for, it would seem, his own benefit, subject [*66] only to the charge; Sir J. Jekyll, M. R., expressed an opinion, that, notwithstanding the copyhold was *not* surrendered to the use of the will, "the copyhold should be charged with the debts *pari passu* with the freehold;" and His Honor accordingly decreed, "that the freehold and copyhold estates, particularly devised by the testator, were liable to the payment of his debts, *pari passu*."^(s) In the later case, however, of *Growcock v. Smith*, (also determined before the statute mentioned,) the law seems to be differently laid down; a distinction being there made between surrendered and unsundered copyholds. The testator, in this case, having both freehold and copyhold estates, and having surrendered the copyholds to the use of his will, made his will, and thereby expressly charged "all and singular his real estate," with the payment of so much of his debts as his personal estate should not be sufficient to satisfy: and he then devised the freehold and copyhold estates to different persons. The personal estate was considerably deficient for payment of the debts. "The Court thought the copyholds well charged, and directed the deficiency to be raised out of the freehold and copyhold, *rateably* according to their value; and stated the distinction to be, that where a testator having both freehold and copyhold estates, but *not* having surrendered the copyhold to the use of his will, charges all his real estates with the payment of his debts, there the copyhold should not be applied until the freehold was exhausted; but where he *had* surrendered them, the freehold and copyhold should contribute *rateably*."^(t) *Harris v. Ingledew*, and *Growcock v. Smith*, appear to be authorities, that if, by the will of a person deceased after the statute 55 George III. c. 192, copyhold lands are expressly devised, and the testator devises freehold land also, and charges both freehold and copyhold with the payment of his debts; whether the copyhold is, or is not surrendered to the use of the will, the copyhold is, *pari passu* with the freehold, liable to satisfy the debts; in other words, the freehold and copyhold are liable to contribute *rateably* according to their value.

*SECTION V.

[*67]

EXEMPTION OF THE TESTATOR'S PERSONAL ESTATE.

EXCEPT as against creditors, from whom a testator cannot, unless they

(r) *Harris v. Ingledew*, 3 P. W. 91, 96, 97; *Ithell v. Beane*, 1 Ves. 215, 1 Dick. 132; *Tudor v. Anson*, 2 Ves. 582; *Car v. Ellison*, 3 Atk. 77; *Coombes v. Gibson*, 1 Bro. C. C. 273, and *Belt's* ed. 274, n. (8.) See *Pope v. Garland*, 3 Salk. 84.

(s) 3 P. W. 91, 96, 98, and 99, n. [B]; 6 Vin. Abr. 58; 2 Eq. Cas. Abr. 255.

(t) 2 Cox, 397. See *Coombes v. Gibson*, 1 Bro. C. C. 273.

please, take his personal assets, *(u)* a charge of debts on real estate may exempt the testator's personal property from its natural liability to be first applied in the payment of them. But a charge on the testator's real estate, or on a particular part of it, *(v)* is not alone or of itself sufficient to exonerate the personalty. The personal estate will continue to be first applicable, *(w)* unless an intention to exempt it can be collected from some part of the will. *(x)*

In *Morrow v. Bush*, where a will provided a particular fund, namely, certain parts of the testator's real estate, for the payment of his debts, and which fund was not sufficient to pay them, real estate settled by the will was, on the intent to exempt the personal estate, held to be obliged to make up the deficiency. *(y)* In *Gleed v. Gleed*, personal estate was held not to be exempted from being first liable to pay debts and legacies, charged by the will on real estate; and, in the same case, certain legacies were held to be payable out of real estate only. *(z)*

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*SECTION VI.

RESPONSIBILITY OF A PURCHASER.

WHEN a person devises real estate, and charges it with the payment of debts generally, they not being specified, as by a schedule to the will, a purchaser of the estate is not bound to see to the application of his purchase money. But if the debts, all or some of them, are specified, then the purchaser is, in equity, obliged to see his money applied in the payment of such specified debts. *(a)* And if the charge is of debts generally, and also of legacies, a purchaser is, generally speaking, not bound to see his money applied in payment of either debts or legacies. *(b)* But a purchaser or mortgagee will be a party to a breach of trust, and, consequently, after his money paid, responsible for and liable to pay the legacies charged, if at the time of his purchase or mortgage he had notice, as from the intrinsic nature of the transaction, that his money was not to be applied in satisfaction of the charges created by the will. *(c)*

(u) Prec. Ch. 3; 624 Atk. 4; 1 Wils. 24.

(v) *Bridgman v. Dove*, 3 Atk. 201, 202; *Stapleton v. Stapleton*, 2 Ball & B. 523.

(w) *Mead v. Hyde*, 2 Vern. 120; *Gower v. Mead*, 8 C., Prec. Ch. 2; *French v. Chichester*, 2 Vern. 568, 3 Bro. P. C. ed. Toml. 16; *Dolman v. Smith*, or *Weston*, 2 Vern. 740, Prec. Ch. 456, 1 Dick. 26; *Lucy v. Bromley*, Bumb. 260, Fitzgib. 41, 2 Eq. Cas. Abr. 458, 500; *Hatton v. Nichol*, Cas. T. Talb. 110; *Bromhall v. Wilbraham*, *ibid.* 274, cited *ibid.* 209; *Bridgman v. Dove*, 3 Atk. 201; *Aldridge v. Lord Wallcourt*, 1 Ball & B. 312; *Stapleton v. Stapleton*, 2 Ball & B. 523. See also *Walker v. Jackson*, 2 Atk. 625, and *Davis v. Dee*, 4 Vin. Abr. 455.

(x) *Attorney General v. Barkham*, cited Cas. T. Talb. 206, [210; *Bradnox v. Gratwick*, cited 3 P. W. 325; *Williams v. Bishop of Landaff*, 1 Cox, 254; *Reeves v. Newenham*, 1 Vern. & Scriv. 319, 482, 2 Ridgew. P. C. 11.

(y) 1 Cox, 185.

(z) 2 Kenyon, part 2, p. 14.

(a) *Elliot v. Merryman*, Barn. Ch. Rep. 78; *Walker v. Smallwood*, Amb. 676; *Walker v. Flamstead*, 2 Kenyon, part 2, p. 57. See also 6 Ves. 654, n. These authorities contradict *Anon. Mos.* 96.

(b) *Walker v. Flamstead*, 2 Kenyon, part 2, p. 57.—2 Sim. & St. 205. See *Newell v. Ward*, Nels. 38.

(c) *Watkins v. Cheek*, 2 Sim. & St. 199.

SECTION VII.

MISCELLANEOUS POINTS OF THE GENERAL SUBJECT.

WHEN a will charges real estate with the payment of debts, all debts contracted either before or after the making of the will, and not at the testator's death barred by the Statute of Limitations, 21 James I. c. 16, are, unless a contrary intention clearly appears in the will, a charge on the estate.(d) In *Clarke v. Sewell*, Lord *Hardwicke admitted, that, suppose a man devises all his real estate to A., [*69] and afterwards a particular farm to B., this would be an exception out of the generality to A. "But," continued his Lordship, "it is otherwise where there is a charge by a testator upon all his estates for payment of debts; for there the devisee must take, subject to that charge."(e) If lands are devised in fee to the testator's heir at law, the heir will take by descent, and not by purchase, although by the will the lands are charged with the payment of either debts,(f) or legacies.(g) A person by his will, charged all his real estate with the payment of debts, and devised to his son and heir all the residue of his estate, real and personal. After making his will, he purchased several copyhold estates, held of the manor of W., which he surrendered to such uses as he should, by will or any codicil, thereto, appoint; and he subsequently made a codicil, and thereby devised to the same son all his copyhold estates within the manor of W. On a creditors' bill against the son, Sir W. Grant decided, that the codicil was a republication of the will, so as to make the after purchased copyholds subject to the payment of the testator's debts.(h) Lands held in trust will pass under a devise in general words, as lands, tenements, and hereditaments, contained in the will of a surviving trustee, unless an intention not to include them appears in the will;(i) and such intention is, it seems, inferred, where the testator charges the lands devised, with the payment of debts, or legacies; and consequently the trust estate will not in these instances pass under the will.(j)

*CHAPTER V.

[*70]

OF A POWER TO RAISE MONEY FOR THE PAYMENT OF DEBTS,
DEBTS AND LEGACIES OR LEGACIES ONLY.(a)

A DISPOSITION of land for the payment of debts, or debts and legacies,

(d) *Brudenell v. Boughton*, 2 Atk. 274; *Bridgman v. Dove*, 3 Atk. 201; *Hannis v. Packer*, Amb. 556; *Habergham v. Vincent*, 1 Ves. jun. 411; *Rose v. Conynghame*, 12 Ves. 37, 38.

(e) 3 Atk. 101.

(f) *Plunket v. Penson*, 2 Atk. 290; *Young v. Dennet*, 2 Dick. 452; *Allen, or Allan, v. Heber*, 1 W. Bl. 22, 2 Stra. 1270. The authorities in this, and the next, note overrule *Gilpin's case*, Cro. Car. 161, and *Brittann, or Britiane, v. Charnock*, 2 Mod. 286, 1 Freem. 248.

(g) *Haynsworth v. Pretty*, Cro. Eliz. 833, 919, Mo. 644; *Clerk v. Smith*, 1 Salk. 241; *Plunket v. Penson*, 2 Atk. 290; *Allen v. Heber*, 1 W. Bl. 22; *Emerson v. Inchbird*, 1 Ld. Raym. 728; *Chaplin v. Leroux*, 5 M. & S. 14; *Langley v. Sneyd*, 3 Brod. & B. 243, 1 Sim. & St. 45.

(h) *Rowley v. Eyton*, 2 Mer. 128.

(i) *Lord Braybroke, v. Inskip*, 8 Ves. 417.

(j) *Roe v. Reade*, 8 Durn. and E. 118, cited 8 Ves. 437; *Ex parte Morgan*, 10 Ves. 101.

(a) On the general subject of this section, see, in addition to the authorities, referred to

or legacies only, is frequently held not to pass an estate in the land, but to confer a power only, bare of any estate, to raise money for the purposes intended.(b)

The subject of a power of this description may here be treated of under the following heads:—

SECT. I. *Of the Party to Sell under the Power.*

II. *Of the Statute 21 Henry VIII. c. 4.*

III. *Of the Party to Sell, when no Person is by the Will named for this purpose.*

IV. *Of the Time for Sale, when the Property empowered to be Sold is devised for Life, or is a Reversion expectant on an Estate for Life.*

V. *Of Descent to the Testator's Heir at Law until Sale.*

VI. *Miscellaneous Points of the General Subject.*

SECTION I.

OF THE PARTY TO SELL UNDER THE POWER.

On the party to sell under the power, there are, it will be seen, some extremely refined and important distinctions.

[*71] *If in a bare power to sell to pay debts, or debts and legacies, or legacies only, the testator appoints several persons to sell, as by the words, "I will that A. and B. shall sell," or, "I will that A. B. and C. shall sell," these parties being the executors, or not the executors of the will; or by the words, "I will that my executors shall sell," here if all the parties sell, they must all join in the sale and conveyance;(c) and one of them cannot sell and convey one part of the lands, and another of them another part to the purchaser.(d)

If the words of the power are, "I will that A. and B. shall sell," and other persons, and not A. and B., are appointed the executors of the will, and after the death of the testator A. or B. dies, it is clear that at law the survivor cannot execute the power.(e)

If the words are, "I will that my lands shall be sold by A. and B., my executors," or, "by A. B. and C., my executors," and A. dies; it seems that at law B. in the first case, and B. and C. in the second, cannot execute the power.(f)

If the words are, "I will that A. and B. shall sell," or, "I will that

Anon. Dalison, 26, Ca. 3; 45, Ca. 36, 106; Ca. 56; Dike v. Ricks, or Ricks, Cro. Car. 335, 1 Rol. Abr. 329, pl. 9, 13; Barrington v. Attorney General, Hardr. 419; Tenant v. Brown, 1 Ch. Cas. 180; Cole v. Wade, 16 Ves. 27. Fitzh. Abr. tit. Devise, 10; 1 Rol. Abr. 329, pl. 8.

(b) Culpepper v. Aston, or Austin, 2 Ch. Cas. 115, 221; Stapleton v. Colville, Cas. T. Talb. 202, cited 2 Atk. 626; Yates v. Compton, 2 P. W. 308; Blatch v. Wilder, 1 Atk. 420, 1 West Cas. T. Hardw. 322; Lancaster v. Thornton, 3 Burr. 1037; Foone v. Blount,

Cowp. 464, 466; Newton v. Bennet, 1 Bro. C. C. 135; White v. Vitty, 2 Russell, 484, 495.

(c) Co. Litt. 112 b.; Bro. Abr. tit. Devise, pl. 31.

(d) Plowd. Quer. Qu. 243.

(e) Co. Litt. 112 b., 113 a.; Anon. 2 Dyer, 177 a., Ca. 32; Gwilliams v. Rowel, Hardr. 204. See White v. Vitty, 2 Russell, 484, 499.

(f) Co. Litt. 112 b., 113 a. See Sugd. Pow. 3rd ed. 166.

A. B. and C. shall sell," and these persons are appointed executors, and A. dies; it appears that at law, B. in the first case, and B. and C. in the second, cannot execute the power.(g)

If the words are, "I will that my two executors shall sell;" if one of them dies, the survivor it is said, cannot at law execute the power.(h)

If the words are, "I will that my executors shall sell," the testator not in this place naming them, and he appoints A. and B., or, A. B. and C., to be his executors; it must be stated to be a matter of some doubt, whether, if in the first case A. dies, or in the second case A. and B. die, the survivor B. or C. can at law execute the power, since one person only cannot satisfy the word executors, in the plural.(i) The inclination of the later authorities *seems however to be, that as [*72] the executorship, or office of executor devolves to the survivor, the authority to sell survives with the office, and consequently that the power may be executed by the survivor.(j)

If the words are, "I will that my executors shall sell," the testator not naming them here, and he appoints A. B. and C. to be his executors; if A. dies, it is certain that B. and C. may, both at law and in equity, execute the power; because, being two persons, the word executors, in the plural, continues to be satisfied by the number of survivors.(k)

It appears from Perkins,—that if a testator says, "I will that my executors shall sell," and appoints two executors, and one of them renounces the executorship, and the other proves the will, a sale by the latter alone is valid;(l) a case, as presently will be seen, expressly provided for by the statute 21 Henry VIII. c. 4: that if the testator says, "I will that A. and B., my executors, shall sell," and they both renounce the executorship, yet that they may sell, because they are named in such direction to sell:(m) but that if he says, "I will that my executors shall sell," without here expressing their names, and they all renounce the executorship, they cannot in this case sell:(n) that if the testator says, "I will that A., Mayor of London, shall sell," and before the sale another man is chosen mayor, A. may, notwithstanding, execute the power:(o) that if the testator says, "I will that A. my heir shall sell," and A. dies before the sale, A.'s heir *cannot sell:(p) that if [*73] he says, "I will that A. my now executor shall sell," the executors of A. cannot sell:(q) and if he says, "I will that my executors

(g) Anon. 2 Dyer, 177 a., Ca. 32; Co. Litt. 112 b., 113 a.

(h) Co. Litt. 181 b.

(i) See Gowdchap's case, East. T. 49 Edw. III. Ca. 10, p. 16, Bro. Abr. tit. Devise, pl. 10, Fitzh. Abr. tit. Devise, pl. 8; Anon. Mo. 61, Ca. 172; Lock v. Loggin, 1 Anders. 145; Anon. Gouldsb. 2, Ca. 4.—Co. Litt. 112 b., 181 b.; also Preamble to Stat. 21 H. VIII. c. 4; and 6 Durn. & E. 396.

(j) Perk. 550; Honell v. Barnes, Cro. Car. 282; Barnes's case, W. Jones, 352.—Harg. Co. Litt. 113, a., n. (2), 181 b., n. (3); Sugd. Pow. 3rd ed. 165, 166; 2 Prest. Abstr. 254.

(k) Bro. Abr. tit. Devise, 31; Townshend v. Wale, or Whales, or Walley, Cro. Eliz. 524, Owen, 155, Mo. 341; Lee v. Vincent,

Cro. Eliz. 26, 3 Leon. 106, Mo. 147, Co. Litt. 112 b., 113 a.; Rowland v. Lee, S. C., cited 1 Anders. 145.

(l) Perk. 545. See also Bonifaut v. Greenfield, Cro. Eliz. 80.

(m) Perk. 548, Bro. Abr. tit. Testament, pl. 1. See also Sugd. Pow. 3rd ed. Append. p. 641.

(n) Perk. 548, Bro. Abr. tit. Testament, pl. 1; Yates v. Compton, 2 P. W. 308, seems to be an authority to the same effect. See also Keates v. Burton, 14 Ves. 434; yet see Sugd. Pow. 3rd ed. 172, and ib. Append. p. 640, 641.

(o) Perk. 552.

(p) Perk. 550.

(q) Perk. 552.

shall sell," and the executors prove the will, and appoint their executors, and die before they sell, that their executors may sell; but if they make no executors, that their administrators cannot sell, for want of privity, for the sale is a thing of trust.^(r) This statement by Perkins, that the executors of the executors may sell, seems to be an authority, that if the testator says, "I will that my executors shall sell," and the surviving executor appoints his executors, and dies, that his executors may at law and in equity sell. And, on the principle of privity, if he appoints one executor only, it should seem that this executor may at law and in equity sell.^(s) Yet it appears if the testator says, "I will that B. and C. my executors sell," and dies, and B. dies, and C. makes M. his executor, and dies, and M. sells, this sale is at law void."^(t)

If the words of the will are, "I will that my executors shall sell," and they all renounce the executorship, it seems that an administrator with the will annexed cannot, at law or in equity, execute the power.^(u)

If the testator devises to A. for life, and wills that, after the death of A., the land shall be sold "by my executors, or the executors of my executors," and appoints two executors, and during the life of A. one of them dies intestate, and afterwards the other executor appoints his executors, and dies, and afterwards A. dies; it has been held that the executors of the surviving executor cannot at law execute the power.^(v)

If the testator devises to A. for life, and directs that, after A.'s death, the lands shall be sold by his executors, without naming them here, and [*74] makes B. C. and D. his executors; and, during the life of A., one of the executors, as B., dies; then after the death of A., C. and D. may both at law and in equity sell.^(w) But if the direction is, that after A.'s death the lands shall be sold by B. C. and D., my executors, it seems that the survivors C. and D. cannot at law sell.^(x)

A man devised to his wife for life, remainder to K., his daughter, in tail, and if she died without issue, that then after the death of his wife the land should be sold by his executors, together with the assent of A. B., and made his wife and a stranger his executors, and died. The wife entered and died, and A. B. died, and the executor who survived alone sold the land. The question was, whether it was a good sale or not, And the Court was of opinion it was not good, for want of sufficient authority.^(y)

The examples which have been mentioned of a bare power in a will, to sell real estate for the payment of debts, or legacies, prove that the object, in the interpretation of the words of the will, is to fulfil the testator's intention, and that, far from adopting a strict interpretation of the will, the Courts, in order to promote the sale intended, lean very much to put a liberal construction on the words of the power. And in consequence of that object and liberal construction, it is, that although the Courts will not

(r) Perk. 549. See also on a personal power, not transferrable to a new trustee appointed, *Hibbard v. Lamb*, Amb. 309.

(s) See Perk. 550; *Houell v. Barnes*, Cro. Car. 382; Sugd. Pow. 3rd ed. 165, 166; 2 Prest. Abstr. 254.

(t) Bro. Abr. tit. Testament. pl. 1, tit. Executors, pl. 3.

(u) *Isabel Gowdchep's case*, 49 Edw. III. 16, Bro. Abr. tit. Devise, pl. 10, Year Book

15 H. VII. 11 b., Sugd. Pow. 3rd ed. Append. p. 640, 641; *Yates v. Compton*, 2 P. W. 308.

(v) Anon. Mo. 61, Ca. 172, cited 16 Ves. 45.

(w) Co. Litt. 112 b.; Bro. Abr. tit. Devise, pl. 31; Anon. 2 Leon. 220.

(x) Co. Litt. 112 b., 113 a.

(y) *Danne v. Annas*, 2 Dyer, 219 a.

interpret the will to empower a sale by any party, or any party alone, not meant to be entrusted with this authority;—as by A., if the power is given to A. and B.:(z) or by A. and B., if the power is given to “my executors,” and both A. and B., who are appointed the executors, renounce the executorship;(a) or by the executors of A., if the power is given to “A. my now executor;”(b) or by the administrators of executors, if the power is given to “my executors;”(c) or by an administrator with the testator’s will annexed, if the power is given to “my executors,” and they all renounce the executorship;(d) or by A. *after the death of B., and without B.’s assent, if the power [*75] is given to A. to sell, with the assent of B.:(e)—yet, inclined to authorize at law a sale under the power, the Courts, it appears, interpret the words to empower a sale by surviving executors, if the power is given to “my executors,” and the number of surviving executors satisfies the word executors, in the plural;(f) by A. and B., if the power is given to “A. and B. my executors,” and both A. and B. renounce the executorship;(g) by A. if the power is given to A., Mayor of London, and before the sale another man is chosen mayor;(h) and by the executors of executors, if the power is given to “my executors;”(i) and farther, it may perhaps be stated, by a surviving executor of the testator, or even by the executors or executor of a surviving executor of the testator, if the power is given to “my executors.”(j) And in any of the cases which have been mentioned, although the power cannot be exercised at law, yet certainly a Court of Equity will, while the trust implied in it exists, enforce the execution of that trust, by decreeing a sale pursuant to the testator’s intention.(k)

A devise to trustees or executors to sell is, it may be noticed, essentially different from a bare power given to them for the purpose. For when a person devises land to trustees or executors, in trust to sell, the will passes to the devisees the testator’s estate in the land. The devise makes them joint-tenants, and therefore if one or more of them die before this tenancy is severed, the estate and trust survive to the remainder. As, if a testator devises “to A. and B.,” in trust to sell, and appoints them, or other persons, executors; or devises “to my executors,” in trust to sell, and appoints A. and B. executors; in these, and the like, cases, if one of the devisees, as A., dies, the estate and *trust will survive to B., and he alone may consequently sell and convey [*76] to a purchaser.(l) And in this place it may farther be mentioned, that where land is devised to trustees, or executors, in trust to sell, the devise

(z) Co. Litt. 112 b., 113 a., 181 b.; Anon. 2 Dyer, 177 a., Ca. 32; Gwilliams v. Rowel, Hardr. 204.

(a) Perk. 548; Yates v. Compton, 2 P. W. 308.

(b) Perk. 552.

(c) Perk. 549.

(d) Bro. Abr. tit. Devise, pl. 10; Yates v. Compton, 2 P. W. 308.

(e) Danna v. Anna, 2 Dyer, 219 a.

(f) Co. Litt. 112 b., 113 a.; Townshend v. Wake, Cro. Eliz. 524.

(g) Perk. 548. See also Sugd. Pow. 3d edit. Append. p. 641.

(h) Perk. 552.

(i) Perk. 549, 552.

(j) Perk. 549, 550; Houell v. Barnes, Cro. Car. 382.—Harg. Co. Litt. 113 a., n. (2) 181 b., n. (3); 2 Preat. Abstr. 254.

(k) Gwilliams v. Rowel, Hardr. 204; Garfoot v. Garfoot, 1 Ch. Cas. 35; Asby v. Doyl, ib. 180; Amby v. Gower, S. C., 1 Ch. Rep. 168; Pitt v. Pelham, 1 Ch. Rep. 283, 1 Lev. 304, 2 Freem. 134, 1 Ch. Cas. 176; Locton v. Locton, 2 Freem. 136, 1 Ch. Cas. 179; Yates v. Compton, 2 P. W. 308; Witshot v. Souch, 1 Ch. Rep. 183.

(l) Co. Litt. 113 a., 181 b.; Jenk. Cent. C. 1, Cas. 83.

prevents a descent to the testator's heir at law, who is therefore not entitled to enter on the death of his ancestor. The devisees are entitled to enter, and they, or the survivors or survivor of them, or other trustees or trustee for the time being, may sell and convey, without the concurrence of the heir at law of the testator.(m)

SECTION II.

OF THE STATUTE 21 HENRY VIII. C. 4.

THE statute 21 Henry VIII. c. 4, which, when part of executors refuse to act, authorizes a sale by the remainder, recites and enacts as follows:(n)—

“When divers persons before this time, having other persons seised to their use of lands, have by their last wills and testaments willed and declared such their said lands to be sold by their executors. And notwithstanding such trust so by them put in their said executors, it hath oftentimes been seen, where such last wills and testaments of such lands have been declared, and in the same divers executors named, that after the decease of such testators some of the same executors, willing to accomplish the trust that they were put in by the said testator, have accepted the charge of the said testament, and the residue of the same [*77] executors *have refused to intermeddle in anywise with the execution of the said will, or with the sale of such lands so willed to be sold by the testator. And forasmuch as a bargain and sale of such lands, so willed by any person to be sold by his executors, after the opinion of divers persons, can in no wise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named to and for the same;—

“For remedy whereof, be it enacted, that where part of the executors named in any such testament of any such person, so making or declaring any such will of any such lands, tenements, or other hereditaments, to be sold by his executors, after the death of any such testator do refuse to take upon him or them the administration and charge of the same testament and last will, wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the cure and charge of the same testament and last will; that then all bargains and sales of such lands, tenements, or other hereditaments, so willed to be sold by the executors of any such testator, as well heretofore made as hereafter to be made, by him or them only of the said executors that so

(m) Bro. Abr. tit. Assise, 356, tit. Devise, 5; Fitzh. Abr. tit. Devise, 8; Perk. 542; Co. Litt., 236 a. See also *Stile v. Tomson*, 2 Dyer, 210 a. In *Fowle v. Green*, 1 Ch. Cas. 262, where the heir was obliged to join in the sale, the reason of this compulsion does not appear.

(n) See generally on this statute, Anon. 1 Anders. 27, Ca. 62; Anon. Benloe (ed.

1689) 15, Ca. 18.—Bro. Abr. tit. Devise, 26, 31; Co. Litt. 113 a.; Cro. Eliz. 856; Jenk. Cent. 44; Godb. 78; Gouldsb. 2; 6 Durn. & E. 396; 3 Prest. Abstr. 225, 253, 263; Sugd. Gilb. Uses, 3rd ed. 128, n. (4); the reference in which note to *Treat. of Purch.*, p. 387, seems to be p. 517, in the 6th ed. of that work.

doth accept, or that heretofore hath accepted and taken upon him or them any such cure or charge of administration of any such will or testament, shall be as good and as effectual in the law, as if all the residue of the same executors, named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of the bargain and sale of such lands, tenements, or other hereditaments, so willed to be sold by the executors of any such testator, which heretofore hath made or declared, or that hereafter shall make or declare, any such will of any such lands, tenements, or other hereditaments, after his decease to be sold by his executors."

In *Bonifaut v. Greenfield*, where a testator devised a manor to four persons and their heirs, in trust to sell, and appointed them executors, and one of them renounced the trust and executorship, the Court was of opinion that, at common law, the remainder might sell; and it was adjudged, that a sale by the three was good, either by the common law, or by the statute 21 Henry VIII. c. 4. (o) *In *Denne v. Judge*, [*78] a person devised lands to five persons in trust for sale, and appointed them executors; who accepted the trust and executorship; but such devisees had nothing to do with the land as executors, and the money when raised was not distributable by them in their character of executors. The trustees did not refuse the trust, but all accepted it; and deeds of lease and release were produced, appearing on the face of them to have been duly executed by all the five trustees, but the execution of three only of them was in fact proved. The deeds were held to convey three fifths only of the property; and it was decided that the statute 21 Henry VIII. c. 4, did not apply to support the conveyance of the whole. (p)

SECTION III.

OF THE PARTY TO SELL WHEN NO PERSON IS BY THE WILL NAMED FOR THIS PURPOSE.

WHEN a will contains a bare power of sale, by simply directing real estate to be sold, and does not say by whom, the party to sell is sometimes the executors, and sometimes the heir at law of the testator.

The executors are to sell, whenever they, in the execution of their office, (q) are to apply the produce of the sale to pay debts, (r) or both debts and legacies, (s) or legacies only; (t) as, in the last case, where the produce of the sale is, by the terms of the will, to be confounded with the testator's personal property, and with it to form one fund for the

(o) *Cro. Eliz.* 80; *Bonifaut v. Greinfield*, 8. C., *Godb.* 77, 1 *Leon.* 60, cited *Wilmot Rep.* 56. See also *Hawkins v. Kemp*, 3 *East*, 410, 429, 434, 437, and *Adams v. Taunton*, 5 *Madd.* 435.

(p) 11 *East*, 288.

(q) *Tylden v. Hyde*, 2 *Sim. & St.* 241.

(r) *Anon.* 3 *Dyer*, 371 b., *Ca.* 3; *More's case*, cited 1 *Anders.* 145; *Anon. Dalison*,

106, *Ca.* 56; *Anon.* 2 *Leon.* 220; *Blatch v. Wilder*, 1 *Atk.* 420.—*Perk.* 547, 2 *Leon.* 43, 3 *Leon.* 167, 1 *Lev.* 304.

(s) *Anon.* 2 *Leon.* 220. See *Hughes v. Collis*, 1 *Ch. Cas.* 179.

(t) *Anon.* 2 *Leon.* 220; *Anon. Dalison*, 106, *Ca.* 56; *Carvill v. Carvill*, 2 *Ch. Rep.* 301.

[*79] payment of the legacies.(u) But if the produce of the sale is not to be applied by the executors *in the execution of their office, then the executors are not necessarily the party to sell. And if the testator simply bequeaths the money to arise from the sale to certain persons named, this bequest alone does not cause the money to be applicable by the executors in the execution of their office, and therefore, in this case, they are not, but the heir at law of the testator is, the party to sell and convey to the purchaser.(v)

Where executors are the party to sell, and two executors are appointed, and one dies before or after the death of the testator, and before or after he has proved the will, it seems to be clear that the power survives with the office, and therefore that the survivor may sell.(w)

In *Patton v. Randall*, it was held that neither the executors, nor the heir at law, took by implication a power of sale under the will, but that as the property directed by the testator to be sold was devised by him, the devise created in the devisees a trust for sale, for the purposes mentioned in the will: and it was decided that a sale could not take place until all the devisees, some of whom were infants, attained the age of 21; and that the executors, who had agreed to sell the estate, could not compel the purchaser to complete his contract.(x)

SECTION IV.

OF THE TIME FOR SALE, WHEN THE PROPERTY EMPOWERED TO BE SOLD IS DEVISED FOR LIFE, OR IS A REVERSION EXPECTANT ON AN ESTATE FOR LIFE.

WHERE a person devises to A. for life, and directs that, after A.'s death, the lands shall be sold by his executors, Sir E. Coke was of opinion that the lands could not be sold before the death *of

[*80] A.(y) And, it would seem to the same effect, another authority states, that where a man wills that his lands shall be sold after the death of A. by his executors, the time of sale is not come until the death of A.(z) But where A., the devisee for life, was one of two executors, and the other executor died in A.'s life-time, a sale before the death of A. has been held to be valid. As, where a man devised his lands to his wife for life, and farther willed that if he should not have any issue by his wife, then after the death of his wife the lands should be sold, and the money distributed to three of his blood, and made his wife and another his executors; and the other executor died, and the wife sold the lands; here the Court of King's Bench held, "that the lands should be sold in

(u) *Tylden v. Hyde*, 2 Sim. & St. 238.

(v) *Bentham v. Wiltshire*, 4 Madd. 44, cited 1 J. & W. 193, 196. See also *Pitt v. Pelham*, 1 Lev. 304, 1 Ch. Cas. 176, 2 Freem. 134, T. Jones, 25, and *Locton v. Locton*, 2 Freem. 136, and cited 1 Ch. Cas. 179.

(w) *Anon.* 3 Dyer, 371 b., Ca. 3; *More's*

case, cited 1 Anders. 145; *Anon.* 2 Leon. 220; *Houell v. Barnes*, Cro. Car. 382, W. Jones, 352.

(x) 1 J. & W. 189.

(y) Co. Litt. 112 b., 113 a. See *Hargr. Co. Litt.* 113 a. n. (2), and *Sugd. Pow.* 3rd ed. 272.

(z) Bro. Abr. tit. Devise, 31.

the life of the wife, otherwise they could never be sold. (a) *Houell v. Barnes* was a case sent from the Court of Chancery for the opinion of the Court of King's Bench. One report of it states,—“F. B., seised of land in fee, deviseth it to his wife for her life, and afterwards orders the same to be sold by his executors, and the monies thereof coming to be divided amongst his nephews; and made W. C. and R. C. his executors. W. C. died; the wife is yet alive. We all resolved, that the surviving executor may sell. But whether he might sell the reversion immediately, or ought to stay until the death of the wife, was a doubt.” (b) Another report of the same case states the effect of the devise in these terms:—A., seised of land, “devises it to his wife for life, and that after the death of his wife it should be sold by his executor,” for payment of his debts and legacies. And, according to this report, one of the executors died, and the wife died, and the Court certified that the surviving executor might sell. But no notice is taken of the second point in the case, the power of the executor to sell in the life-time of the wife. (c) In *Uvedale v. Uvedale*, a person recited in his will, that his wife was, under a settlement, entitled to certain lands for her life, for her jointure. And by his will he confirmed such jointure of his wife, “and after her death willed that the lands should be sold, and the money divided between cer- [*81] tain persons named. Lord Hardwicke decreed the lands to be sold, because (as the report is understood) the *cestuis que trust* under the will were entitled to have them sold; and he decreed a sale in the life-time of the wife. And his Lordship observed, that “the words ‘after her decease’ were not put in to postpone the sale.” (d) A learned writer mentions a case before the Court of Exchequer, where a devise was to A. for life, and after her decease to trustees to sell, and pay the money amongst the children then living; and the Court held the sale could not be made till after the wife's decease. (e) In *Bentham v. Wiltshire*, where a person devised to H. B. for her life, and directed that after her decease the estate should be sold, (not saying by whom,) and the money to be paid amongst certain persons in the will named; it appears that on a sale in the life-time of the tenant for life, it was objected to the vendor's title, that the will only directed a sale after the death of the tenant for life, who was still living; but that, on a reference to the master, he reported a good title could be made, and that report was confirmed. And yet Sir John Leach seems in a farther stage of the cause to have considered, that a sale was not authorized during the life of the tenant for life; for a circumstance which had some weight with His Honor, when he decided that under the will there was no power of sale in the executors, was, that the sale was directed to be made after the death of the tenant for life, who was one of the executors. (f)

From these cases this general rule may be extracted,—That where the property empowered to be sold is devised for life, the time for sale will depend on the intention to be collected from the whole will; and, so far as the particular words may not be governed by the context in the will, on the weight due to the authorities, grounded on the same or similar expres-

(a) Anon. 2 Leon. 220. See *Bentham v. Wiltshire*, 4 Madd. 44.

(b) Cro. Car. 382.

(c) *Barnes's case*, W. Jones, 352.

(d) 3 Atk. 117.

(e) Anon. Excheq. 1806, stated Sugd. Pow. 3rd ed. 273.

(f) 4 Madd. 44. See *Carvill v. Carvill*, 2 Ch. Rep. 301.

sions; and that consequently the time for sale may be either before or after the death of the tenant for life, according to the circumstances of the particular case.

[*82]

*SECTION V.

OF DESCENT TO THE TESTATOR'S HEIR AT LAW UNTIL SALE.

A PERSON may in some cases sell land, and convey an estate in it, although at the time of the sale and conveyance he himself has no estate in it; or, to use the words of Littleton, although "he hath nought in the tenements at the time of the estate made." An example of this capability to sell and convey is furnished by a will, which authorizes a sale by executors of the testator's lands of inheritance, and which lands, until the sale and conveyance of them to the purchaser, descend to the testator's heir at law. Here the executors may sell the lands, and convey the testator's estate in them, although they take under the will "nought in the tenements," but only a power, that is bare of any estate.(g)

When a will contains a bare power of this description, and given to executors either expressly or by implication, then, unless the property is devised away from the testator's heir at law,(h) it will, until the power is executed, descend to such heir. But an execution of the power by the executors will, without the concurrence of the heir, divest his seisin, and transfer it to the purchaser, and consequently the heir is not in this case a necessary party to the sale or conveyance.(i) But as the inheritance, when descended to the heir, will continue in him until the power is executed; for this reason, in cases where from circumstances the power cannot be exercised at law, and the trust of it nevertheless subsists in equity, a Court of Equity will make the heir a trustee for sale, and accordingly decree him to join in the sale, and to convey to the purchaser. The Court will decree the heir to join in the sale and conveyance, if the power is given to A. and B., and other persons are appointed the executors of the will, and *A. or B. dies before the power is [*83] executed;(j) or if the power is given to executors, and they all die before it is executed;(k) or if the power is given to executors, and they all renounce the executorship, and accordingly administration with the will annexed is granted;(l) and also in cases where the will empowers a sale, and omits to mention the party to make it, and the heir is construed to be the person to sell.(m) In *Blatch v. Wilder*, where a

(g) Litt. S. 169; *Houell v. Barnes*, Cro. Car. 392.

(h) *Stapleton v. Colville*, Cas. T. Talb. 202; *Blatch v. Wilder*, 1 Atk. 420.

(i) Litt. S. 169; Co. Litt. 236, a.; 9 Co. 77 a.; Bro. Abr. tit. Devise, 5, 32, 36, 46; *Perkins*, 541; *Lancaster v. Thornton*, 2 Burr. 1031; *Hilton v. Kenworthy*, 3 East, 558; *Warnford v. Thompson*, 3 Ves. 513; *Tylden v. Hyde*, 2 Sim. & St. 238, *White v. Vitty*, 2 Russ. 495, 496, 497.

(j) *Gwilliams v. Rowel*, Hardr. 204.

(k) *Asby v. Doyl*, 1 Ch. Cas. 180; *Amby v. Gower*, S. C., 1 Ch. Rep. 168; *Garfoot v. Garfoot*, 1 Ch. Cas. 35, 2 Freem. 176.

(l) *Yates v. Compton*, 2 P. W. 308.

(m) *Pitt v. Pelham*, 1 Ch. Rep. 283, 1 Lev. 304, 2 Freem. 134, 1 Ch. Cas. 176; *Locton v. Locton*, 2 Freem. 136, 1 Ch. Cas. 179.

testator directed his real estate to be sold for the payment of his debts, but did not say who should sell it; and the executors were held to take under the will a power of sale, and the Court decreed the property to be sold; it also ordered that the executors and the heir should join in the sale.(n)

It appears that when a will contains a bare power to sell real estate, which until the sale descends to the heir of the testator, such heir is at law entitled to the intermediate rents and profits until a sale;(o) but if the power is to sell to pay debts, or debts and legacies, or legacies only, such rents and profits do not, it seems, in equity belong to the heir, if they are required for the purposes of the trust.(p)

SECTION VI.

MISCELLANEOUS POINTS OF THE GENERAL SUBJECT.

SIR Edward Coke seems to have been of opinion, that "when a man devises his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold."(q) The soundness of this opinion may however be doubted. And it may be thought that a devise, namely, an expression "of the testator's will [*84] or mind,(r) in the words, "I devise my lands to be sold by my executors," is equivalent to the words, "I devise that my executors shall sell my lands," and, like the latter words, will not pass to the executors an estate in the lands, but a bare authority only.(s) A testator provided in his will, that "if my personal estate, and my house and lands at W., should not pay my debts, then my executors to raise the same" out of certain copyhold premises before devised by him. On the question, whether this proviso would entitle the executors to sell the copyhold estate, Lord Hardwicke held that it would; "for as the rents are not near enough to discharge the testator's debts, these words will give the trustees [executors] a power to sell, to satisfy the testator's intention of paying his debts."(t) An executor or other party, to whom a bare power of sale of real estate is given by a will, is not able to release the power to the heir at law: such release is held to be void.(u) Unless the contrary is expressed in a bare power to sell, the authority conferred by it is personal, and cannot be delegated, and consequently cannot be exercised by a deed executed by attorney.(v) Although on a sale under a bare power, the trustees or executors, donees of the power, necessarily, since the testator is dead, sell and convey in their own names to the purchaser, yet the purchaser is in by the deviser, and not by the

(n) 1 Atk. 420, 1 West Cas. T. Hardw. 222, cited 2 Russ. 496. See also *Carvill v. Carvill*, 2 Ch. Rep. 301, 303, and *White v. Vitty*, 2 Russ. 484.

(o) Co. Litt. 113 a., 236 a.

(p) *Lancaster v. Thornton*, 2 Burr. 1031; *Yates v. Compton*, 2 P. W. 308, 311; *Uvedale v. Uvedale*, 3 Atk. 118.

(q) Co. Litt. 236 a.
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(r) 2 Burr. 1031.

(s) Bro. Abr. tit. Devise, 5, 32, 36; Co. Litt. 236 a., Lord Nott. n. (1); Co. Litt. 265 b.; *Yates v. Compton*, 2 P. W. 308.

(t) *Bateman v. Bateman*, 1 Atk. 421.

(u) Co. Litt. 265 b.

(v) *Combes' case*, 9 Co. 75 b., 1 Rol. Abr. 330.

trustees or executors.(w) When a will contains either a devise, or a bare power to sell, it appears that the devisee, or donee of the power, may sell part of the land at one time and part at another, as purchasers may be found.(x)

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*CHAPTER VI.

OF LEGACIES PAYABLE OUT OF REAL ESTATE.

- SECT. I. *Of Legacies payable out of Real Estate, in aid of the Personal Estate.*
- II. *Of Legacies payable out of Real Estate, in exoneration of the Personal Estate.*
- III. *Of Legacies payable out of certain Real and Personal Estates, in exoneration of the general Personal Estate.*
- IV. *Of Legacies held to be payable out of the Personal Estate only.*
- V. *Of a Devise on condition to pay Legacies.*
- VI. *Of charging by a Codicil, not executed according to the Statute of Frauds.*
- VII. *Of withdrawing one of two Funds charged with Legacies.*
- VIII. *Of revoking by a Codicil, not executed according to the Statute, Legacies charged by the Will on Real Estate.*
- IX. *Of substituting and adding Legacies by a Codicil.*
- X. *Of Legacies charged on Land devised for Life, with Remainders over; or charged on a Remainder or Reversion in Fee, expectant on an Estate for Life.*
- XI. *Purchase of Estate charged.*
- XII. *Of Legal and Equitable charges.*
- XIII. *Of the failure of Real Estate charged with Legacies.*
- XIV. *Of the sinking of a Legacy into the Inheritance, on the death of the Legatee before the time of payment.*
- XV. *Miscellaneous Points of the General Subject.*

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*SECTION I.

OF LEGACIES PAYABLE OUT OF REAL ESTATE, IN AID OF THE PERSONAL ESTATE.

A TESTATOR'S personal estate is the natural fund for the payment of

(w) Fitzh. Abr. tit. Devise, pl. 3; 9 Co. 77 a.; 1 Rol. Abr. 330, F. 3; Beal v. Shepherd, Cro. Jac. 199.

(x) Co. Litt. 113 a.; 1 Co. 173 b.

legacies bequeathed by him. And his real property is not liable to pay them, unless an intention to create this liability can be collected from some part of the will.(a)

Legacies have, in several cases, been construed to be payable out of the testator's real estate, in aid of his personality; when, consequently, the latter property was first liable to pay them.(b)

This construction has been put on the following will:—

"As to all my worldly estate, I give and dispose thereof in manner following." Then the testator gave several pecuniary legacies, and several annuities for lives, to be paid by his executor; and then he devised all the rest and residue of his goods, and chattels, and estate, to his nephew M., the testator's heir at law, and made him sole executor.(c)

"I give and dispose my worldly estate as follows." The testator then gave some general legacies, and concluded his will in these words:—"Lastly, I give the remainder of my estate at N. and D., and all my freehold and personal estate whatsoever, not herein otherwise disposed of, after payment made of my just *debts and legacies, to my brother S. B., whom I also appoint my executor to this [*87] my last will."(d)

Amongst other legacies, a testator made this bequest,—“I give to J. D. the sum of 1000*l.*, to be due and payable to him by my executor, whom I shall herein appoint, after the expiration of one month next after my decease.” Then followed some general legacies, and this farther disposition,—“Also I give, devise, and bequeath to T. H., and to his heirs for ever, whom I do hereby make and appoint my only and sole executor of this my will, all my goods, lands, and chattels, except what is hereinbefore given.”(e)

“As to my worldly estate I dispose of as follows.” The testator then gave 100*l.* to his daughter S., which he directed to be paid by his executor within a month after the decease of his widow. The testator devised his real estate to his wife for life, and, after her decease, to his son J. C., in fee. He also appointed two trustees and overseers of his will, and deaired them to see it duly performed. And all the rest and residue of his goods, chattels, and personal estate, not before disposed of, he gave to his son J. C., and made him executor.(f)

“As touching and concerning my worldly estate, I give, devise, and bequeath as follows. I give, devise, and bequeath to my daughter F., 300*l.* at twenty-one. Item, I give, devise, and bequeath to my sons W., F., and J., each 220*l.*, to be paid at twenty-one, with benefit of survivor-

(a) 4 Madd. Rep. 188.

(b) Lord Grey v. Lady Grey, 1 Ch. Cas. 296; Hyde v. Hyde, 3 Ch. Rep. 155; Alcock v. Sparhawk, 2 Vern. 228; Jones v. Selby, Prec. Ch. 288; Whaley v. Cox, 2 Eq. Cas. Abr. 549, as to the legacy of 200*l.*; Lloyd v. Williams, Barn. Ch. Rep. 224, 228; Lord Inchiquin v. French, Amb. 33, 41; Hannis v. Packer, ib. 556; Ironmonger v. Lemelle, 1 West Cas. T. Hardw. 143; Bridgman v. Dove, 3 Atk. ed. Sand. 201, and n. (2). Minor v. Wicksteed, 3 Bro. C. C. 627. See likewise Lord Pawlet v. Parry, Prec. Ch. 449, Gilb. Eq. Rep. 123; Webb v.

Webb, Barn. Ch. Rep. 86; Hone v. Medcraft, 1 Bro. C. C. 261, on the legacies which immediately follow the viz.; Jackson v. Jackson, 2 Cox, 35; Holford v. Wood, 4 Ves. 76; and Willox v. Rhodes, 2 Russ. 452; also Tompkins v. Tompkins, Prec. Ch. 397.

(c) Awbrey v. Middleton, 4 Vin. Abr. 460, 2 Eq. Cas. Abr. 497. There was, it appears, an express devise in the will to another relation of the testator.

(d) Brudenell v. Boughton, 2 Atk. 268, 273.

(e) Edgell v. Haywood, 3 Atk. 352, 358.

(f) Lypet v. Carter, 1 Ves. 499.

ship. Item, my will is, that my executor, with the advice of my trustee, shall place out my sons apprentices, and pay out of their aforesaid fortunes proper sums on that account. Item, my executor is to pay to my trustee 30*l.* a year for the education of the children. Item, I give, devise, and bequeath to my son H. H., all and singular my real and personal estate, not herein disposed, to him, his heirs, and assigns. And I appoint my brother H. overseer of my will." From the argument in the case, it appears that the son H. H. was appointed the executor of the will.(g)

[*88] *C. P. devised certain freehold chambers to trustees and their heirs, upon trust to sell, and to apply the money arising by such sale towards payment of the legacies by his will bequeathed; and the rents and profits thereof, until sold, to be applied to the same uses. And after giving two pecuniary and some specific legacies, as to, for, and concerning all the rest, residue, and remainder of his personal estate, after payment of his debts, legacies, and funeral expenses, he bequeathed the same unto his trustees, upon trust to convert such residue into ready money, and to lay out the same in the purchase of freehold property, which the trustees were to settle in the manner mentioned in the will.(h)

J. H. gave all his real and personal estate to his wife for life; and after her decease gave various legacies; and all the rest, residue, and remainder of his real and personal estate, he gave, devised, and bequeathed, to P. W. and W. B.(i)

"As to my worldly estate, I will that all my lawful debts be paid first. I give and bequeath unto," &c. The testator here gave numerous general legacies of small sums of money. And then continued—"It is further my will, that the daughter of the said W. F., and the daughters of the said R. F., shall not receive their money, until they shall have attained the age of twenty-one years." And at the end of the will he said, "And it is further my will, that in case there should be any bad debts, that is to say, not recoverable, then each person shall receive in proportion according to such loss. And if my worldly estate should amount to more than here bequeathed, then it is my will that each person shall receive his proportion according as heretofore bequeathed." The will contained no devise or mention of real estate, except under the words "worldly estate" in the passages transcribed. Sir J. Leach, on deciding that the testator's real estate was charged with the legacies, said, "The words 'My worldly estate,' unless qualified by other expressions, necessarily comprise both real and personal estate, and there is nothing in this will which amounts to such a qualification."(j)

[*89] *In *Spong v. Spong*, pecuniary legacies, charged on real estate in aid of the personalty, were held not be charged on real estate specifically devised by the will.(k)

(g) *Hassel v. Hassel*, 2 Dick. 537. See *Joyce's case*, Nels. 155.

(h) *Maugham v. Mason*, 1 Ves. and B. 410.

(i) *Bench v. Biles*, 4 Madd. 187.

(j) *Muddle v. Fry*, 6 Madd. 270.

(k) 3 Bligh P. C. (N. S.) 84, 1 Dow. & C. 365; reversing the decree of the Court of Exchequer, 1 Y. & J. 300.

SECTION II.

OF LEGACIES PAYABLE OUT OF REAL ESTATE, IN EXONERATION OF THE PERSONAL ESTATE.

As real estate may, in *aid* of the testator's personal estate, be made liable to the payment of legacies, so it may, in *exoneration* of the personal estate, be made the *first* or *only* fund applicable to pay them. Either kind of exemption will take place, if, on an examination of the whole will, such intention can be collected from any part of it. (*l*)

An exoneration of the personalty has been held to be effected in the cases named in the margin. (*m*) In several other cases the real estate seems to have been held to be the *only* fund applicable to pay the particular legacies. (*n*) Where, however, it is the intention, the personalty may be liable as an auxiliary fund in aid of the real estate first charged. (*o*)

In *Harrison v. Naylor*, the testator's general personal estate was exonerated from the payment of certain legacies; which were held to be payable out of real estate, by the will directed to be bought with the testator's personal estate, remaining after payment of debts and other legacies. (*p*)

*Although the whole terms of the wills, on which it has [*90] been held, that the real estate was the *only* fund applicable to pay the legacies, may not, it is probable, often, if ever, occur again in practice, yet it may be allowed here to make use of them, as the ground of the following observations:—

1. That the personal estate may be wholly' exonerated, notwithstanding the legacy is given by a bequest, that, without the aid of the context, would be a gift out of the personalty; and that accordingly a legacy, so given out of the personalty, has by the context been made a charge on the real estate only. (*q*)

2. That, in other cases, the particular legacy was, independently of any context, given out of the real estate; as by the words, "I bequeath 1000*l.* to T., to be paid to him when he shall have arrived at his age of twenty-one, out of the manor of B." (*r*) And again, "I give to W. C. 100*l.*, to be paid to her out of my said freehold and copyhold estates." (*s*)

And 3. That, in other instances, the legacy was, independently of context given out of the real estate, but the intent to exonerate the per-

(*l*) *Miles v. Leigh*, 1 Atk. 575, 1 West Cas. T. Hardw. 709.

(*m*) *Walker v. Pink*, cited 1 Cox Rep. 5; *Ward v. Lord Dudley and Ward*, 2 Bro. C. C. 316, 1 Cox, 438. See also *Ex parte Morgan*, 10 Ves. 101, and *White v. Vitty*, 2 Russ. 484.

(*n*) *Anon.* 12 Mod. 342; *Jennings v. Looks*, 2 P. W. 276; *Heath v. Heath*, ib. 386; *Phipps v. Annesley*, 2 Atk. 57; *Amesbury v. Brown*, 1 Ves. 482; *Lowther v. Condon*, Barn. Ch. Rep. 327, 329; *Lawson v. Hudson*, 1 Bro. C. C. 58; *Lawson v. Lawson*, S. C., 3 Bro. P. C. ed. Toml. 424, on the 100*l.* legacy; *Gawler v. Standerwick*,

2 Cox; 15, 18; *Crowder v. Clowes*, 2 Ves. jun. 449; *Shirt v. Westby*, 18 Ves. 393; *Abrams v. Winshup*, 3 Russ. 350; *Rickets v. Ladley*, ib. 418; *Kirke v. Kirke*, 4 Russ. 435.

(*o*) *Whaley v. Cox*, 2 Eq. Cas. Abr. 549; *Strode v. Ellis*, Nels. 203.

(*p*) 3 Bro. C. C. 108, 2 Cox, 247.

(*q*) *Phipps v. Annesley*, 2 Atk. 57; *Crowder v. Clowes*, 2 Ves. jun. 449.

(*r*) *Jennings v. Looks*, 2 P. W. 276.

(*s*) *Lawson v. Lawson*, or *Hudson*, 3 Bro. P. C. ed. Toml. 424, 1 Bro. C. C. 58. See also *Anon.* 12 Mod. 322, and *Seal v. Tichenor*, 2 Dick. 444.

sonalty was shown by the context also. In one case of this kind, the testator gave legacies, and directed that they should be paid out of his real estate, and gave his personal estate to his children.^(t) In another case, the will contained the following disposition,—“ I bequeath to each of my daughters 1000*l.*, to be raised and to be paid to them immediately after the decease of my wife, out of the rents, issues, and profits of my manors, lands, &c. in W., or by sale or mortgage of the same, together with interest from the decease of my said wife, until the same sums shall be duly paid to my said daughters, or their respective executors, &c. And my will is, that in case either of my said daughters shall depart this life before me, then the survivor of my said daughters, her executors, &c., shall have and receive all and every the sum and sums of money hereinbefore devised out of my said lands, to be raised in the manner hereinbefore [*91] fore *appointed. And, in such case, the part of the daughter so dying shall not cease, or sink into the estate for the benefit of my heir, but shall remain and be raised for the benefit of my daughters. Lastly, I bequeath all my personal estate to my said daughters, and do make them executors.”^(u) In a farther case, a testator having given his estate generally after payment of debts and funeral, without mentioning legacies, afterwards gave four legacies to his sisters, and in the same clause added, “ all which legacies I mean shall be paid out of my freehold estate in N.” And, by a subsequent clause, he gave a power to mortgage and charge the real estate for payment of that money.^(v) And in another instance, after a devise in fee of certain lands called O. and W., subject to the payment of the legacies after given, and charged upon the said premises, the testator gave 400*l.* to H. and 200*l.* to S., to be paid them respectively at their ages of twenty-one years out of his said tenements, called O. and W., with interest from his death; and he thereby charged the said tenements called O. and W. with the same accordingly.^(w)

A legacy is frequently charged on land by a *condition* in the will to pay it. Sometimes a devise is immediately followed by a condition to pay a specified sum;^(x) and sometimes the legacy, and condition to pay it, are contained in a clause distinct from the devise of the land.^(y) Under the first kind of devise on condition, it would seem that the legacy will, without the aid of any context, be a charge on the land only.^(z) And it is apprehended that, if this fund fails, the legacy will not be payable out of the testator's personal estate,^(a) unless an intent to make the [*92] personally an auxiliary fund can be collected from some other *part of the will.^(b) Where a will contained the second kind of devise on condition, the construction put on the whole will taken

(t) Heath v. Heath, 2 P. W. 366.

(u) Lowther v. Condon, Barn. Ch. Rep. 327, 329.

(v) Amesbury v. Brown, 1 Ves. 482.

(w) Gawler v. Standerwick, 2 Cox, 15, 18.

(x) Seal v. Tichener, 2 Dick. 444. See 1 West Cas. T. Hardw. 709.

(y) Miles v. Leigh, 1 West Cas. T. Hardw. 707, 1 Atk. 573, 4 Vin. Abr. 463, 2 Eq. Cas. Abr. 503; Whaley v. Cox, 2 Eq. Cas. Abr. 549.

(z) See Jennings v. Look, 2 P. W. 276;

Anon. 12 Mod. 342; Lawson v. Hudson, 1 Bro. C. C. 59; and Seal v. Tichener, 2 Dick. 444.

(a) See, besides the cases in the last note, Amesbury v. Brown, 1 Ves. 482; Brydges v. Phillips, 6 Ves. 571; Spurway v. Glynn, 9 Ves. 483; Hancox v. Abbey, 11 Ves. 185; Gittins v. Steele, 1 Swanst. 29, 30.

(b) Whaley v. Cox, 2 Eq. Cas. Abr. 549.

together was, in *Miles v. Leigh*, that the testator meant the condition to follow immediately the devise of the land, and that the land so devised was the only fund applicable to pay the particular legacy;(c) and in *Whalley v. Cox*, that the land devised on condition was the first fund applicable to pay the legacy, and that the testator's personal estate was, in aid of the land, also liable to pay it.(d)

Personal estate has, in many instances, been held to be exempted from the payment of legacies, where the will has contained a devise of real estate, in trust to sell, and to pay certain sums out of the purchase money;(e) and also where the will has contained a separate bequest of certain legacies and has devised real estate in trust to sell, and pay them.(f) And it appears that when a will contains a devise of real estate, in trust to sell, and out of the purchase money to pay certain sums, or to pay certain legacies bequeathed by a separate clause in the will, and the real estate devised is the first fund for the payment of those legacies of either kind, such estate will also be the *only* fund to pay them; and although it fails, as by a sale of the whole or part of the estate in the testator's lifetime, the testator's personal estate will not be liable to pay any part of those legacies,(g) unless, from some words in the will, the intent appears to bequeath demonstrative legacies, payable out of the personal estate, in the event of the failure of the real property made the first fund or security to pay them.(h)

In *Spurway v. Glynn*, a person by his will, subject to and charged *with the payment of all and every the pecuniary legacies [*93] thereafter bequeathed, devised to G. and P., as tenants in common in fee, all his real estates in England, except his moiety of an estate called P. He then devised that moiety of the P. estate to trustees, upon trust, by sale or mortgage, or out of the rents and profits, to raise 400*l.* and pay it to the plaintiff. And by a residuary clause he directed the residue of his personal estate to be applied in payment of the several legacies thereby given, in ease and exoneration of his real estates therefore charged with the payment of them. Sir W. Grant noticed that the legacy of 400*l.* was not bequeathed separately from the devise in trust to raise it, observing that "there is no direct bequest to the plaintiff of 400*l.*, but that sum is directed to be raised out of this particular estate, and paid to him;" and decided that the 400*l.* was charged exclusively on the P. estate, and that it was not payable out of the testator's personal assets.(i)

(c) 1 West Cas. T. Hardw. 707, 1 Atk. 573.

(d) 2 Eq. Cas. Abr. 549.

(e) *Arnald v. Arnald*, 1 Bro. C. C. 401, 2 Dick. 645; *Leacroft v. Maynard*, 1 Ves. jun. 279, 3 Bro. C. C. 233; *Brydges v. Phillips*, 6 Ves. 566, 571; *Hancox v. Abbey*, 11 Ves. 179, 185; *Rickets v. Ladley*, 3 Russ. 418.

(f) *Gittins v. Steele*, 1 Swanst. 24. See also *Carvill v. Carvill*, 2 Ch. Rep. 301.

(g) *Arnald v. Arnald*, 1 Bro. C. C. 401; *Gittins v. Steele*, 1 Swanst. 24. See *Foley v. Percival*, 4 Bro. C. C. 419.

(h) *Fowler v. Willoughby*, 2 Sim. & St. 354; *Strode v. Ellis*, Nels. 203.

(i) 9 Ves. 483.

SECTION III.

OF LEGACIES PAYABLE OUT OF CERTAIN REAL AND PERSONAL ESTATES,
IN EXONERATION OF THE GENERAL PERSONAL ESTATE.

IN *Hartley v. Hurle*, certain real estate, and leaseholds for years, and money in the funds, by a will given to trustees, in trust to pay the several legacies thereafter mentioned, were held to be the only fund applicable to pay the legacies; and which, consequently, were payable out of that real estate and part of the personal estate, in exoneration of the general personal assets of the testator. *(j)* In *Austen v. Halsey*, Lord Eldon appears to have thought that legacies were not a charge on the bulk of the testator's real estate; but he declined to give an opinion, whether they were a charge on that property; and, on the intention collected from the whole will, decided that they were payable from the accumulated savings out of the testator's "real and personal [*94] estates. *(k)* In *Cole v. Turner*, legacies were held to be charged on freehold, copyhold, and leasehold estates, and, it would seem, on them, only. *(l)*

SECTION IV.

OF LEGACIES HELD TO BE PAYABLE OUT OF THE PERSONAL ESTATE ONLY.

THE proper fund for the payment of legacies is the testator's personal estate; and his real property is not, either first or last, charged with them, by a mere bequest, unaccompanied by any context indicative of an intent to create that charge. *(m)*

Several cases occur in which legacies have been construed not to be a charge on the testator's real estate, but to be payable out of his personal estate only. This interpretation has been put on the following will: *(n)*—

A person bequeathed 500*l.* to his grandson J., and 500*l.* to his grandson T.; and charged his lands with the payment of those legacies; and then went on, "Item, I give to my grandson A. 500*l.*, and to my grandson B. 500*l.*" The legacies to A. and B. were held not to be charged on the land. *(o)*

A will began in these words,—“As to my wordly estate, I dispose of the same as follows, after my debts and legacies paid.” Then the testator gave several legacies. After which he bequeathed 1500*l.* a-piece to his five daughters, payable at twenty-one, or marriage; and then followed these words, “after all my legacies paid, I give the residue of my personal estate to my son.” Then he devised his fee-simple lands to his son and his heirs; and if his son should die without issue in

(j) 5 *Ves.* 540, 545.

(k) 6 *Ves.* 475.

(l) 4 *Russ.* 376.

(m) 2 *Freem.* 265.

(n) See also *Lord Pawlet v. Parry*, or

Perry, *Prec. Ch.* 449, *Gilb. Eq. Rep.* 123, 4 *Vin. Abr.* 461, 2 *Eq. Cas. Abr.* 497; *Austen v. Halsey*; 6 *Ves.* 475; and *Howell v. Hayler* 1, *Hovend. Supplem. to Ves.* 342.

(o) *Grise v. Goodwin*, 2 *Freem.* 264.

the lifetime of any of his daughters, he devised his real estate to his daughters; to whom he ordered interest to be paid at 5*l.* per cent. by his executors, for their portions until the same should become due; [*95] *and appointed his son and one S. his executors. The son, to whom the lands were devised, was the only son and heir at law of the testator. The personal estate was not sufficient to pay all the portions, but was enough to pay much the greatest part of them. The deficiency was held not to be charged on the real estate. (p)

T. J. S. devised to his heir at law certain real estates in fee, "subject to and chargeable nevertheless with the payment of all my just debts, funeral charges, bonds, annuities, and all legacies hereafter mentioned; that is to say, to T. S. I give 1000*l.*, to W. S., I give 1000*l.*" And here followed numerous other legacies bequeathed in the same way. The testator afterwards made several other devises and bequests, and disposed of the residue of his personal estate. And at the end of the will he appointed Mrs. H., together with J. L. and R. F. executors; and then added, "and I do bequeath to the said J. L. and R. F., to each of them, 1000*l.*" On the whole will taken together, the charge of legacies on the real estate was held to be confined to the legacies enumerated immediately after the words "that is to say," and not to extend to the legacies given at the end of the will to J. L. and R. F. (q)

J. K. by his will disposed as follows:—"First I will and direct that all my legal debts, legacies, and funeral expenses, shall be fully paid and discharged." He then gave some directions for his burial, and proceeded:—"Next I devise to my niece S. R., and her heirs, all my messuages, lands, tenements, and hereditaments, situate in B." He then devised another messuage to his cousin M. J., in fee. And he devised to C. K. another estate in fee. He then bequeathed several legacies; and gave all the residue of his real and personal estate to R. A., S. B., and M. J., and appointed them executors. Beyond the first sentence in the will, there were no words to charge the legacies on the real estate; and Sir R. P. Arden held that the terms of that sentence were not sufficient for the purpose. (r)

*A. F. bequeathed 600*l.* to her daughter, A. P. She also bequeathed to another of her daughters 100*l.*, and gave several small legacies to other persons. [*96] She then directed that the legacies, which she had given, should be paid, within two years after her decease, by her executor to such of the legatees as should then have attained the age of twenty-one years, and to the others, as and when they should attain that age. She next devised a real estate, which she particularly mentioned, and all other her real estates to her son C. in fee. And as to all the rest and residue of her said personal estate, which should remain after payment of her debts and funeral expenses, she gave the same to her said son, for his own use and benefit, and appointed him sole executor. Sir J. Leach decided that the legacies were not charged on the real estates. (s)

In *Kightley v. Kightley*, Sir R. P. Arden drew a distinction between *debts* and *legacies*, and decided that this first sentence in a will, "First

(p) *Davis v. Gardiner*, 2 P. W. 187.

(q) *Hone v. Medcraft*, 1 Bro. C. C. 261.

(r) *Kightley v. Kightley*, 2 Ves. jun. 328.

(s) *Parker v. Fearnley*, 3 Sim. & St. 592.

I will and direct that all my legal debts, legacies, and funeral expenses, shall be fully paid and discharged," were not sufficient to charge legacies on real estate devised by specific devise in the will; although he had no doubt but the same words charged that estate with the payment of debts. The grounds of this distinction seem to have been, that a provision for debts is obligatory on the conscience, but legacies are purely voluntary; that the real estate was specifically devised; and that there is no reason why pecuniary legacies should have any preference to such specific devises.^(t) This distinction appears, however, to have dissatisfied Lord Loughborough, who has observed on it,—"In *Kightley v. Kightley*, the Master of the Rolls states a difference between debts and legacies: I do not know how to state a difference between them."^(u) But in a subsequent case Sir R. P. Arden maintained his former opinion, and then said, "As to the distinction between debts and legacies, I am still of the same opinion that I held in *Kightley v. Kightley*, though the Lord Chancellor doubted my distinction. I cannot agree that where [*97] there is a specific devise, there is no difference between debts and legacies. The testator must be taken to mean his debts to be paid, and then his legacies to be paid; and a specific devise is as much a legacy in this sense as a pecuniary legacy."^(v) And again, in a later case, his Honor said, "I have formerly fully expressed my opinion upon this point, as to the difference between debts and legacies; I understand the Lord Chancellor expressed some doubt about it; but upon reflection I still remain of the same opinion."^(w)

SECTION V.

OF A DEVISE ON CONDITION TO PAY LEGACIES.

ON the subject of a condition to pay a legacy, may be considered,

1. The general nature of a devise that is a condition, and of a conditional limitation.
2. A condition to pay a legacy, and the remedies of the legatee for it.
3. A condition to pay a legacy, when the devise is to the testator's heir at law.
4. A condition to pay a legacy, when the will gives to the legatee a right of entry on non-payment of it.
5. The equitable relief afforded to the devisee, if the condition is broken.

1. When a devise is made on a condition, and the condition is broken; the effect of the breach of the condition may be different in different cases. In one case the effect may be, to entitle the testator's heir at law to enter, and by this entry to destroy the estate on condition; and, in another case, to cause such estate to cease of itself, without any entry for

(t) 2 Ves. jun. 328.
(u) 3 Ves. 551.

(v) Ibid. 739.
(w) 5 Ves. 362.

the purpose.(x) Technically speaking, the devise is in the first case a condition, and in the second *case a conditional limitation; in [*98] other words, in the first case a condition, and in the second a limitation.(y)

There are certain "apt and legal" words of condition;(z) as, *sub conditione*, upon condition;(a) *proviso*, or *proviso semper*, provided, or provided always;(b) *ita quod*, so that.(c) There are also certain apt and legal words of limitation,(d) as *quamdiu*, so long as;(e) *quousque*, until;(f) *durante*, during.(g) And on a lease for years, if the lessee shall so long live, the latter words make a limitation.(h)

Certain expressions which, if used in a feoffment or grant, might not be words of condition, are, when found in a will, construed to be apt and legal words of condition;(i) as, in particular it may be mentioned, the words *ad solvendum*, or *solvendo*, to pay, or paying.(j)

Where a devise is a condition, and the condition is broken, the testator's heir at law may enter and avoid the devise; but no one but the heir can do this.(k) Where a devise is a conditional limitation, and the condition is broken, so soon as it is broken *the estate on condition ceases, and a person who is not the testator's heir at [*99] law, as a remainder-man, or executory devisee, may be entitled to enter and supply the vacant possession.(l) When there is a devise over on the conditional limitation, and the condition is broken, that devisee over is entitled to enter. But his entry is not necessary to acquire an estate; for immediately on the termination of the conditional limitation, if the limitation over is a remainder, such remainder-man has an estate in possession,(m) and if it is an executory devise in fee, such devisee over in fee has an estate in fee in possession.(n)

(x) *Wollock v. Hammond*, Cro. Eliz. 204, 3 Co. 20 b.; *Hodgson v. Rawson*, 1 Ves. 44, 47.—Co. Litt. 214 b.; 10 Co. 40 b.

(y) Cro. Eliz. 204; 1 Ves. 47.

(z) Litt. S. 328; Bro. Abr. tit. Conditions, pl. 7, 43; 10 Co. 42; *Duke of Norfolk's case*, 2 Dyer, 138 a.

(a) Litt. S. 328; Co. Litt. 203 a.; 10 Co. 42; Hardr. 11.

(b) Litt. S. 329; Co. Litt. 203 b.; 10 Co. 42; *Lord Cromwel's case*, 2 Co. 69 b.; *Simpson v. Titterell*, Cro. Eliz. 242; *Earl of Pembroke v. Berkley*, ib. 384, Mo. 706; *Crickmere v. Patterson*, 1 Leon. 174; *Thomas's case*, 1 Rol. Abr. 411. In the words of Sir E. Coke, the word *proviso* "hath divers operations. Sometime it worketh a qualification or limitation, sometime a condition, and sometime a covenant." Co. Litt. 146 b.; 203 b.; Litt. S. 220; *Lord Cromwel's case*, 2 Co. 69 b.; *Anon.* 1 Dyer, 13 b., Ca. 65; *Ayer v. Orme*, 2 Dyer, 221 b.; *Scot v. Scot*, Cro. Eliz. 73, 2 Leon. 128, 8 Leon. 225, 4 Leon. 70.—Bro. Abr. tit. Conditions, pl. 195; 1 Rol. Abr. 410.

(c) Litt. S. 329; 10 Co. 42.

(d) 10 Co. 41 b.; Co. Litt. 235 a.

(e) 10 Co. 41 b.; Co. Litt. 314 b.; 234 b., 235 a.

(f) 10 Co. 41 b.; Co. Litt. 214 b.; Bro. Abr. tit. Conditions, pl. 106.

(g) Litt. S. 380; Co. Litt. 234 b.; 10 Co. 41 b.; *Oland's case*, 5 Co. 116.

(h) 10 Co. 42; Co. Litt. 214 b. See *Brudnel's case*, 5 Co. 9 b.

(i) 10 Co. 42; Cro. Eliz. 146; Co. Litt. 236 b.; Bro. Abr. tit. Conditions, pl. 96, 191, 215, 218; tit. Devise, pl. 19, 46; 1 Rol. Abr. 410; *Anon.* Mo. 57, 4 Leon. 2; *Underwood v. Swain*, 1 Ch. Rep. 161; *Miles v. Leigh*, 1 Atk. 573, 1 West Cas. T. Hardw. 707.

(j) 3 Co. 21; 10 Co. 42; 2 Mod. 7; *Crickmere v. Paterson*, Cro. Eliz. 146, 1 Leon. 174, Co. Litt. 236 b., 1 Rol. Abr. 410, l. pl. 2; *Fox v. Carlyne*, Cro. Eliz. 454; *Miles v. Leigh*, 1 West Cas. T. Hardw. 709. See *Streete v. Beale*, 1 Rol. Abr. 411.

(k) Plowd. 412, 413; 10 Co. 41 b.; Bro. Abr. tit. Conditions, pl. 43; 1 Ventr. 200; 1 Ves. 422, 423, 1 Atk. 424.

(l) 10 Co. 40 b.; 2 Mod. 7; *Newis v. Lark*, Plowd. 408; *Wollock v. Hammond*, Cro. Eliz. 204.

(m) Plowd. 413; 10 Co. 40 b.

(n) *Anon.* 2 Mod. 7.

An opinion once existed, that if a will contained a devise for life on condition, with remainder over in tail, and the condition was broken, the testator's heir at law might enter, and hold during the life of the tenant for life, and that such entry did not destroy the estate in remainder. *(o)* This opinion, which allowed the entry of the heir to have a partial effect only, is however opposed by numerous authorities, and clearly is not now law. The entry of the heir defeats the whole devise; so that if the estate on condition is an estate for life, or other particular estate, with a remainder over, or an estate in fee with an executory devise over, that entry (supposing the devise to be a condition, and not a limitation,) destroys not only the estate on condition, but also the remainder or executory devise over. *(p)* And the circumstance that such entry has this effect is the reason, that now, when a devise is made on condition, with, expressly if the condition is broken, a remainder or executory devise over, such remainder or executory devise is interpreted, not indeed to destroy the condition annexed to the devise, but to make the devise on condition a conditional limitation. *(q)*

[*100] *An opinion once also prevailed, that when a will contained a devise for life, with a remainder over, and an *express* condition was annexed to the estate for life, the devise for life could not be construed to be a limitation, but that the remainder over made void the condition. Accordingly, Sir E. Coke appears to have thought, that words of express condition (meaning, it would seem, apt and legal words of condition expressed) could not be construed to be a limitation. *(r)* And this opinion, which is supported by other authorities, *(s)* he grounded on two decisions; by which it was held, that where a will contained a devise for life on express condition, (expressed in both cases by the words "upon condition,") with a remainder over, this remainder did not make the devise for life a conditional limitation, but had the effect to cause the condition to be void; because to construe the condition to be valid, would entitle the heir at law and not the remainder-man to enter, and the entry of the heir would destroy the remainder, and so defeat the testator's intention. *(t)* These authorities created a distinction between express and implied conditions; for Sir E. Coke admitted that words, which were neither an express condition, nor apt and legal words of limitation, might be construed to be a limitation. *(u)* This distinction has however been a long time exploded. *(v)* And it is now decided by numerous cases, that when a will contains a devise on express condition, with, expressly *(w)* if the condition is broken, a limitation over, this limitation over makes the preceding devise a conditional limitation; and this whether the limitation over is a remainder expectant on an estate

(o) Warren v. Lee, 2 Dyer, 126 b. (53,) (54,) 1 Rol. Abr. 472, I. pl. 4.

(p) Plowd. 412; 10 Co. 41 b.; Co. Litt. 202 a.; Bro. Abr. tit. *Conditions*, pl. 111; 1 Rol. Abr. 472, I. pl. 4; Wiseman v. Baldwin, 1 Rol. Abr. 411, K. pl. 5; Fulmerston v. Steward, cited Cro. Jac. 592.

(q) Wiseman v. Baldwin, 1 Rol. Abr. 411, K. pl. 5; Fulmerston v. Steward, cited Cro. Jac. 592; Lady Fry's case, 1 Vent. 199, 200, 202.

(r) 10 Co. 40 b., 41 a., 41 b.

(s) Thomas's case, 1 Rol. Abr. 411, 843; Skirns v. Bond, ib. 412.

(t) 29 Ass. pl. 17; Bro. Abr. tit. *Conditions*, pl. 111, tit. *Devise*, pl. 16; Fitzh. Abr. tit. *Assize*, pl. 281, cited Plowd. 412, and 10 Co. 40 b.; Dr. Butt's case, cited 10 Co. 41 b.

(u) 10 Co. 41 a.

(v) 1 Vent. 203, 322.

(w) See Gulliver v. Ashby, 1 W. Bl. 607, 4 Burr. 1929.

for life,(x) or in tail,(y) on condition, or is an executory devise in fee limited on an estate in fee on condition;(z) *and also whether [*101] the devise on condition is to the testator's heir at law,(a) or to some other person.(b) In *Gulliver v. Ashby*, a person devised to D. W. for life, remainder to A. S. in tail male, and, for want of such issue, to A. C. the plaintiff, in tail; and a subsequent part of the will contained an express condition, intended to oblige A. S. to take the surname of W. A. S. did not take this name, and suffered a common recovery. The question was not, if, notwithstanding the express condition, the devise to A. S. might be construed to be a conditional limitation, but whether, as the limitation over to A. C. was not made expressly if A. S. broke the condition, the whole will taken together implied that expression: and the Court of King's Bench decided that it did not, and that the devise to A. S. was a condition, and not a limitation.(c) The Court also held that the condition was subsequent. If therefore it was not broken before the recovery suffered by A. S., that recovery destroyed the condition, and barred the remainder of A. C.(d)

Particular expressions found in a will have been construed not to be a condition;(e) and are often interpreted to be a limitation, and not a condition. And this latter interpretation is allowed, although the particular expression, when used in a will, generally speaking makes a condition.(f) A reason to interpret a devise to be a limitation is, that the devise is to the testator's heir at law,(g) or that on the devise there is a limitation over in remainder,(h) or by executory devise,(i) or that the devise is both to the heir at law, and also with a limitation over.(j) To construe the devise to be a condition would extinguish the remedy, where the devise on condition is to the heir at law;(k) and would, [*102] *where there is a limitation over on the devise on condition, occasion the heir to destroy by his entry that limitation over.(l)

2. A common condition annexed to a devise is, to pay a legacy or an annuity.

A devise to a person, who was not the testator's heir at law, on condition to pay a legacy, or annuity, has been held to be a *condition*, and *not* a limitation, in the following cases:(m)—where one devised land to J. S.

(x) See 1 Ventr. 202.

(y) *Wiseman v. Baldwin*, 1 Rol. Abr. 411, K. pl. 5, Cro. Eliz. 377; *Spittle v. Davies*, 2 Leon. 38; *Fry v. Porter*, 1 Ventr. 199, 1 Mod. 86, 300; *Page v. Hayward*, 2 Salk. 570.

(z) *Haynsworth v. Pretty*, Cro. Eliz. 833, 919, 1 Rol. Abr. 411; *Fulmerston v. Steward*, cited Cro. Jac. 592; *Avelyn v. Ward*, 1 Ves. 420.

(a) *Spittle v. Davies*, 2 Leon. 38; *Haynsworth v. Pretty*, Cro. Eliz. 833, 919; *Avelyn v. Ward*, 1 Ves. 420, 423.

(b) *Wiseman v. Baldwin*, 1 Rol. Abr. 411.

(c) 1 W. Bl. 607; 4 Burr. 1929. See *Grimston v. Lord Bruce*, 2 Vern. 594.

(d) *Benson v. Hodeon*, 1 Mod. 111; *Page v. Hayward*, 2 Salk. 570.

(e) *Maridale v. Martin*, Cro. Eliz. 288;

Gibbons v. Marliward, Mo. 594; *Anon.* 2 Leon. 154, 3 Leon. 65.

(f) *Wellock v. Hammond*, Cro. Eliz. 304.

(g) *Wellock v. Hammond*, Cro. Eliz. 304, 3 Co. 20 b.; *Anon.* 2 Mod. 7; *Tunstall v. Brachen*, Amb. 167, 170.

(h) *Newis v. Lark*, Plowd. 408, 412; *Hayward v. Stillingleet*, 1 Atk. 424, 1 West Cas. T. Hardw. 179.

(i) *Wiseman v. Baldwin*, 1 Rol. Abr. 411.

(j) *Avelyn v. Ward*, 1 Ves. 420, 423; *Simpson v. Vickers*, 14 Ves. 341, 346.

(k) Cro. Eliz. 205.

(l) Plowd. 412; 10 Co. 41 b.; Bre. Abr. tit. Conditions, pl. 11b; 1 Rol. Abr. 411, K. pl. 5.

(m) See also *Grimston v. Lord Bruce*, 2 Vern. 594, 1 Salk. 156, *Freke v. Lee*, Pollexf. 553, and *Shawe's case*, Palm. 76.

for years, *reddendo et solvendo* 20s. *annuatim* at Michaelmas to J. D.:(n) also where a copyholder in fee of lands descendible in Borough English had three sons, and devised to the second son in fee, upon condition that he would pay to his four daughters, to every of them at their full age, 20l.:(o) also where P. S., being seised in fee, devised to J. S., his kinsman, and his heirs, in consideration that he should pay all his debts and legacies; and in which will the testator appointed his legacies to be paid within two months after the death of his wife, who had an estate for life in the premises:(p) also where J. H. devised part of his real estate to his mother for life, and afterwards to his cousin W. R., his heirs and assigns, he and they paying thereout legacies to several persons; which sums the testator willed to be paid within twelve months next after his mother's decease:(q) and also where E. R., having two daughters, his heiresses at law, devised his real estate to his kinsman Sir R. R., paying 1000l. a piece to his two daughters, within six months after the decease of his wife.(r)

If the legacy or annuity is not paid, and so the condition is broken, the heir at law of the testator is entitled to enter, and support an ejectment, and at law to recover the land from the devisee.(s) But in equity the heir will be a trustee for the legatee.(t)

[*103] *A devise on condition to pay an annuity was held to be a limitation, and not a condition, in the following case of *Wiseman v. Baldwin*. A man has two sons, R., the eldest, and H., and also two daughters; and devises to H. in tail, when he shall come to twenty-four years of age, "upon condition that he shall pay unto my two daughters 20l. a-year at their full age, and if the said H. die before twenty-four, then I will that R., my son and heir, shall have the said land to him and to his heirs, he giving and paying to my said daughters the said money, in such manner as H. should have done if he had lived: And if my sons H. and R. (if the said lands come to the said R. by the death of H.) do not pay the said money to my said daughters as aforesaid, then I will my said lands shall remain to my said daughters, and to their heirs for ever." On this will it was adjudged—"This a limitation on the estate of H., and not a condition; so that if H. does not pay the money to the two daughters after his age of twenty-four years, and at the full age of the daughters, R. shall have it [the land] by way of limitation, and he cannot enter as for a condition broken; because otherwise, *scilicet*, if this shall be a condition, it would defeat the portions given to the daughters, and the future devise to them, which is against the intent of the devisor."(u)

When a condition to pay a legacy is annexed to a remainder in fee devised to A., and A. dies before the remainder falls into possession, the condition will bind his heir, "if the devise so takes effect, as that he

(n) *Fox v. Carlyne*, Cro. Eliz. 454.

(o) *Curteis v. Wolverston*, Cro. Jac. 56.

(p) *Underwood v. Swain*, 1 Ch. Rep. 161.

(q) *Hodgson v. Rawson*, 1 Ves. 44, 47.

(r) *Barnardiston v. Fane*, 2 Vern. 366.

(s) *Fox v. Carlyne*, Cro. Eliz. 454; *Curteis v. Wolverston*, Cro. Jac. 56; *Barnardiston v. Fane*, 2 Vern. 366; *Freke v. Lee*,

Pollert, 553; *Wigg v. Wigg*, 1 Atk. 383; *Hodgson v. Rawson*, 1 Ves. 44, 47; *Tunstall v. Brachen*, Amb. 167, 170.

(t) *Wigg v. Wigg*, 1 Atk. 383, 1 West Cas. T. Hardw. 679; *Hodgson v. Rawson*, 1 Ves. 47; *Avelyn v. Ward*, ib. 423.

(u) 1 Rol. Abr. 411, K., pl. 5, Cro. Eliz. 377.

must claim under the ancestor, as much as if the ancestor himself had taken in possession."^(v)

3. If a person devises to his heir at law either for years, for life, or in tail, remainder to A. in fee, in either case the heir takes by devise.^(w) But if the ancestor devises to his heir in fee-simple, then the law makes void the devise, and puts the heir in by descent.^(x) If the ancestor devises to A. for years, for *life, or in tail, and the reversion [*104] in fee is undisposed of by the will, a fee-simple, namely the reversion in fee, will descend to the heir. And if the ancestor devises to the heir for years, or for life, and the reversion in fee is undisposed of by the will, this reversion will descend to the heir, and drown the estate for years, or for life, and the heir will be in by descent of the fee in possession.^(y) But if the devise is to the heir in tail, and the reversion in fee descends, the entail will not be merged, and the heir will be seised in tail by devise, and of the reversion in fee by descent.^(z) If the ancestor devises to A. for a chattel interest,^(a) or for a term of years,^(b) or for life,^(c) or in tail,^(d) remainder to the heir in fee, the heir, seised in fee, is in by descent.

In the above instances, the heir seised in fee is so seised, without any limitation over, or condition, to affect that seisin. As a fee-simple, namely a reversion in fee, may descend subject to an estate, as for life, or in tail, devised by the will of the ancestor; so a descent is allowed, subject to an executory devise, or to a condition, created by the ancestor's will; notwithstanding in these cases the heir will not be seised without any limitation over, or condition to affect that seisin.

If a person devises to his heir at law in fee, and, by executory devise, limits on a contingency the fee-simple over to another person; until the contingent event takes place, the freehold^(e) certainly, and it seems also the fee-simple,^(f) descends to the *heir; and the heir seised in [*105] fee, after the executory devise has failed, is, it is decided, in by descent, and not by devise.^(g)

When a person devises to his heir at law in fee, on condition to pay a legacy, this condition will not break the descent, but the heir will take

(v) *Miles v. Leigh*, 1 Atk. 573, 575, 1 West Cas. T. Hardw. 710, where *Marks v. Marks*, [1 Stra. 129] is cited as a strong authority in point.

(w) *Plowd.* 545 a.; *Bro. Abr. tit. Devise*, pl. 4, 41; *Herne v. Meyrick*, 1 P. W. 201.

(x) *Plowd.* 545 a.; *Bro. Abr. tit. Devise*, pl. 4; 1 *Roll. Abr.* 626, l. pl. 1; *Hob.* 30; *Smith v. Triggs*, 1 Stra. 487.

(y) 3 *Leon.* 26; *Wood v. Ingersole*, Cro. Jac. 260.

(z) *Bro. Abr. tit. Descent*, pl. 13; 2 *Co.* 61; *Plowd.* 545 a.

(a) *Anon.* 2 *Dyer*, 124 a., Ca. 38, 1 *Roll. Abr.* 626, l. pl. 3; *Hynde v. Lyon*, 2 *Leon.* 11, 3 *Leon.* 64, 70; *Bashpool's case*, 2 *Leon.* 101, 3 *Leon.* 118, 4 *Leon.* 35; *Doe v. Timins*, 1 *Barn. and Ald.* 530.

(b) *Bro. Abr. tit. Devise*, pl. 41.

(c) *Preston v. Holmes*, 1 *Roll. Abr.* 626, l. pl. 2. See *Miles v. Leigh*, 1 Atk. 574.

(d) *Nottingham v. Jennings*, 1 P. W. 23, 1 *Ld. Raym.* 568, 1 *Salk.* 233.

(e) *Pay's case*, Cro. Eliz. 878; *Hainsworth v. Pretty*, ib. 920; *Gore v. Gore*, 2 P. W. 28, 65; *Hopkins v. Hopkins*, Cas. T. Talb. 44, 52; *Hayward v. Stillingfleet*, 1 Atk. 422, 424, 1 *West Cas. T. Hardw.* 176; *Bullock v. Stones*, 2 *Ves.* 521.

(f) *Hinde v. Lyon*, 2 *Leon.* 11, 3 *Leon.* 64, 70; *Plunket v. Holmes*, 1 *Lev.* 11, T. *Raym.* 28; *Puresfoy v. Rogers*, 2 *Saund.* 380, 3 *Keb.* 11; *Carter v. Barnadiston*, 1 P. W. 505; *Loddington v. Kime*, 1 *Ld. Raym.* 203, 3 *Lev.* 431, 1 *Salk.* 224; *Doe v. Timins*, 1 *Barn. and Ald.* 530, 548, 549. See farther on the abeyance of the fee simple, *Litt.* S. 646, 647, 648, *Co. Litt.* 342 b., 343 a., and *Vick v. Edwards*, 3 P. W. 372.

(g) *Chaplin v. Leroux*, 5 M. and S. 14; *Doe v. Timins*, 1 *Barn. and Ald.* 530; which cases overrule, not the decision, but the reason of the decision, in *Scott v. Scott*, 1 *Eden.* 458, *Amb.* 383. See *Hainsworth v. Pretty*, Cro. Eliz. 833, 919, and *Avelyn v. Ward*, 1 *Ves.* 420, 423.

by descent, and not by devise;(*h*) and in equity the heir will be a trustee for the legatee.(*i*) And if the devise is to the heir at law in fee, on condition to pay a legacy to A., with, expressly if the legacy is not paid, an executory devise over to A. in fee, in this case the devise to the heir is void; and if the legacy is not paid, the estate descended to the heir ceases, and A. may enter.(*j*)

In the case of co-heiresses, if the ancestor devises to them, and their heirs, they will take by devise as joint-tenants, and not be co-parceners by descent.(*k*) And if he devises to one only of two co-heiresses, and to her heirs, this one will take the whole by devise, and not one moiety by devise, and the other moiety by descent.(*l*) And if a devise to one of two sisters, co-heiresses of the testator, is to her and her heirs, on condition to pay a legacy, the devise will be a conditional limitation; and if the legacy is not paid, and so the condition is broken, her estate will cease, and then one moiety will be in her as heir at law, and the other moiety in the other sister as co-heir, who may now enter, or, if necessary, obtain possession by ejectment.(*m*)

[*106] *The following *quære*, made by Manwood, is reported by Dyer:—"A man seised in fee of land in gavelkind, had issue two sons, and devised to the eldest son in fee, on condition that he should pay to the wife of the devisor 100*l.* at a certain day: at which he failed of payment. Whether the younger son may not enter into the moiety upon his brother, as by a limitation implied in the estate, if the condition be not performed?"(*n*) It appears to be now clear that the youngest son may make this entry;(*o*) because, as when a condition is annexed to a devise of gavelkind land, the heir at common law, namely the eldest son,(*p*) is the party to enter if the condition is broken,(*q*) the testator's intention would be defeated, by interpreting the devise to be a condition and not a limitation.(*r*)

A devise on condition to pay a legacy has been held to be a *limitation*, and not a condition, in the following cases, where the devise was to the testator's heir at law. In Wellock v. Hammond, T. W., copyholder in fee of land, of the nature of Borough English, descendible to the *puise* son and *puise* brother, had issue four sons and a daughter; and devised to his wife for life, remainder to J. S., his *eldest* son, paying forty shillings to each of his brothers and to his sister, within two years after the death of his wife.(*s*) In Gugelman v. Duport, F. D. devised to her grandson, J. D., and the heirs of his body, all her plantations and

(A) Clerk, or Clarke, v. Smith, Com. 72, 1 Salk. 241, 1 Lutw. 793, 797; Emerson v. Inchbird, 1 Ld. Raym. 728; Smith v. Alterly, 2 Freem. 136; Whaley v. Cox, 2 Eq. Cas. Abr. 549. These authorities overrule Gilpin's case, Cro. Car. 161, and Brittan v. Charnock, 2 Mod. 288, 1 Freem. 248. See 5 M. & S. 20. On the point of descent, Awbrey v. Middleton, 4 Vin. Abr. 460, 2 Eq. Cas. Abr. 497, appears also to be overruled.
(i) Smith v. Alterly, 2 Freem. 136; Wigg v. Wigg, 1 Atk. 383; Bacon v. Clerk, 1 P. W. 478, Prec. Ch. 500.

(j) Hayneworth v. Pretty, Cro. Eliz. 833, 919, Mo. 644, 1 Rol. Abr. 411. See Anon. Cas. T. Holt, 254, 6 Mod. 241.

(k) Anon. Cro. Eliz. 431; Beare's case, 1 Leon. 112; Hedger v. Rowe, 3 Lev. 127.

(l) Reading v. Rawsterne, or Royston, 2 Ld. Raym. 899, 1 Salk. 242.

(m) Tunstall v. Brachen, Amb. 167, 1 Bro. C. C. 124, n.

(n) 3 Dyer, 316 b. (5.)

(o) Wellock v. Hammond, Cro. Eliz. 204, 3 Co. 20 b.; Tunstall v. Brachen, Amb. 167.

(p) Bro. Abr. tit. *Discent*, pl. 59.

(q) 3 Dyer, 343, b.; Noy's Max. 82.

(r) Cro. Eliz. 205.

(s) Co. Eliz. 204, 3 Co. 20 b., 2 Leon. 114.

lands, upon condition that he first paid 1000*l.* to her grand-daughter, J. D., at her age of twenty-one years, or marriage, which should first happen; and she thereby charged her said lands and plantations with the said sum of 1000*l.* And she empowered her executor to raise and pay the same out of the rents and profits of the said premises, and to keep the said plantations, and other lands, in his own possession, till the said 1000*l.* should be so raised and paid. On this will Lord Hardwicke observed,—“Here is a devise to the heir at law upon condition, which operates *as a limitation, and gives a right of entry to the legatee; the daughter [grand-daughter] therefore had a legal [*107] estate, and a legal remedy.”(t)

4. As a devise on condition is often construed to be a limitation, when made to the testator's heir at law; or when made to some other person, with, expressly if the condition is broken, a limitation over; so when land is devised in fee, on condition to pay a legacy, with, if the legacy is not paid, an express gift to the legatee of the right to enter, and hold, and take the rents and profits, until the legacy is satisfied, the effect of this gift of a right to enter is, to make the devise on condition a conditional limitation.(u) Such right to enter is a chattel interest, and if the legacy is not paid, the legatee will have a legal chattel estate, and may enter, and, with resemblance to a tenant by *elegit*, may hold possession, and take the rents and profits, until out of them he has paid himself the legacy.(v) Also his right of entry entitles him, if necessary, to the legal remedy of ejectment to obtain possession.(w) The right to enter, Lord Hardwicke has observed, is “improperly called a power; for a right of entry will go to executors and administrators.”(x) And on the same, and other authority, it may be mentioned, that if this chattel interest “be granted to a man, although his executors are not named, yet they will take it barely as his representatives.”(y)

There appears to be a distinction between a right to enter and hold until payment of a legacy or annuity, and a right to enter and distrain if an annuity is not paid. For when a will contains a devise, on condition to pay a rent or annuity, with, if the rent is not paid, an express gift to the annuitant of the right to enter and distrain, and the devise is not made to the testator's heir at law, it would seem that the right to enter and distrain only does not make the devise a conditional limitation; but that *both remedies, the right of the heir to [*108] enter, and the right of the annuitant to enter and distrain, may stand together; and that if the rent is not paid, either remedy may be availed of against the devisee.(z) If, however, the heir enters, the right to distrain will, it is presumed, be destroyed;(a) and then the heir appears to be a trustee for the annuitant.(b)

5. When a will contains a devise on condition to pay a legacy, and

(t) 1 West Cas. T. Hardw. 577, 579. See also *Emes v. Hancock*, 2 Atk. 508.

(u) *Wigge v. Wigge*, 1 West Cas. T. Hardw. 577, 1 Atk. 382; *Emes v. Hancock*, 2 Atk. 507, 509; *Embrey v. Martin*, Amb. 230.

(v) *Wigg v. Wigg*, 1 Atk. 383; *Emes v. Hancock*, 2 Atk. 509, cited 3 Atk. 116; *Sherman v. Collins*, 3 Atk. 319, 322.

(w) *Sherman v. Collins*, 3 Atk. 322.

(x) 3 Atk. 322.

(y) *Ibid*; *Embrey v. Martin*, Amb. 230; *Manning v. Herbert*, Amb. 577.

(z) *Anon.* 3 Dyer, 348 a., Ca. 13; *Shaw v. Norton*, cited 1 Leon. 269, See *Streets v. Beale*, 1 Rol. Abr. 411.

(a) *Plowd.* 412; 10 Co. 41 b.; Co. Litt. 202 a.; 1 Rol. Abr. 411, K. pl. 5.

(b) *Wigg v. Wigg*, 1 Atk. 383.

there is not a limitation over if the legacy is not paid, and the devise is a condition and not a limitation, and the condition is broken, and the heir enters, it appears that a Court of Equity will afford relief to the devisee, and put him again in possession, on payment of the legacy, with interest and costs.(c) And the like remedy is, it seems, extended to the devisee, when the devise is on condition to pay a legacy, and the devise is made a limitation by a right given to the legatee, if the legacy is not paid, to enter and hold until it is satisfied.(d) But when a devise is to A. in fee, on condition to pay a legacy to B., with, if the legacy is not paid, a limitation over to a third party, C., in fee, and which limitation over makes the devise a conditional limitation, it appears that if the condition is broken, and then consequently the estate of A. ceases, equity cannot relieve him, but allows to C. the benefit of the forfeiture, and permits him accordingly to enter, and hold under the limitation over. And the effect of the breach of the condition will, it is presumed, be the same, if the devise over in fee is not to a third party, but to the legatee himself.(e)

[*109] Here it may be mentioned, that if land is devised to A. for life, *remainder to B. in fee, on condition to pay legacies at certain times appointed, with, if the legacies are not accordingly paid, a limitation over to C. in fee; a Court of Equity will, to enable B. to perform the condition, allow him to enter during the life of the tenant for life, and to cut and sell the timber for the purpose of paying the legacies.(f)

SECTION VI.

OF CHARGING BY A CODICIL, NOT EXECUTED ACCORDING TO THE STATUTE OF FRAUDS.

If a legacy is bequeathed by a will, real estate cannot *thereby* be charged with the payment of it, unless the will is executed and attested according to the Statute of Frauds, 29 Ch. II. c. 3.(g) And if a legacy is bequeathed by a codicil, real estate cannot *thereby* be charged with the payment of it, unless the codicil is so executed and attested.(h) But when a legacy is bequeathed by a codicil, real estate may be by the *will* charged with the payment of it, notwithstanding the codicil is not executed according to the statute, provided the will is so executed. But here a distinction is to be noticed between a charge originally on the land, or other real estate, and a charge which, made on this estate, is auxiliary only to the personalty. For when by a will executed accord-

(c) Underwood v. Swaine, 1 Ch. Rep. 161; also Cage v. Russel, 2 Ventr. 352; Cleaver v. Spurling, 2 P. W. 528; and Maston v. Barnardiston v. Fane, 2 Vern. 366; Grimston v. Lord Bruce, 2 Vern. 594, 1 Salk. 156; Willoughby, 5 Vin. Abr. 93, 2 Eq. Cas. Abr. Fry v. Porter, 1 Mod. 311. See also Cage v. Russel, 2 Ventr. 352; Popham v. Bampfild, 1 Vern. 81; Bertie v. Lord Falkland, 1 Salk. 231, 2 Freem. 220, 3 Ch. Cas. 129, 2 Vern. 333; Fry v. Porter, 1 Mod. 308.

(d) Sherman v. Collins, 3 Atk. 319, 322.

(e) Simpson v. Vickers, 14 Ves. 341. See

(f) Claxton v. Claxton, 3 Vern. 152, Prec. Ch. 15; Nelson v. Nelson, cited 3 Vern. 153.

(g) Brudenell v. Boughton, 2 Atk. 273; Lawson v. Hudson, 1 Bro. C. C. 60.

(h) Masters v. Masters, 1 P. W. 422.

ing to the statute, real estate is, as an auxiliary fund, in aid of the testator's personal property, charged with the payment of legacies bequeathed out of such personal estate, a legacy given by a codicil unattested, or otherwise not executed according to the statute, may be a charge on the land or other real estate charged by the will.(i) But if the charge is originally on the real estate, *that is, if the will charges that estate [*110] with the payment of legacies, and exempts the testator's personal estate from its liability to be first applied to pay them; here, as the legacies given by the will are not payable first out of the personal estate, a legacy given by a codicil, which is not executed according to the statute, will not, it appears, be a charge on the testator's real property charged by the will.(j) The principle on which the legacies given by the codicil are, in the first branch of this distinction, charged on the real estate, is said to be, analogy between a charge of this kind, and a charge of debts on real estate: which, when so charged by a will executed according to the statute, will be burthened with debts contracted not only before but after the making of the will, and up to the time of the testator's death.(k) This analogy certainly offers a principle on which future legacies may be brought within the charge made by the will; yet, on the authority of Sir J. Jekyll and Lord Hardwicke, the charge of the legacies given by the codicil may be thought to rest, quite independently of analogy, on these principles,—that the will is executed according to the statute; that the charge made by the will is of legacies given out of personal estate, and is meant to include future as well as present legacies so given; that the legacies given by the codicil are bequeathed out of personal estate; and that the codicil is a part of the will.(l)

When by a will, executed according to the statute, real estate is, as an auxiliary fund in aid of the testator's personal estate, charged with the payment of legacies bequeathed out of the personal estate, a legacy given by a codicil, although unattested, will be charged on the real estate, if the charge in the will is made by words sufficiently general to take in future legacies;(m) as by the words, "I devise to A. all the rest and residue of my real and personal estate, after payment of my debts [*111] and legacies."(n) But a legacy bequeathed by a codicil will not be charged on the real estate, if this estate is in the will charged with the payment of legacies "above-mentioned,"(o) or "hereby," or "hereinafter," bequeathed,(p) or in other terms, which confine the charge to particular legacies only.

Legacies given by a codicil may be by the will charged on the real

(i) *Hyde v. Hyde*, 3 Ch. Rep. 155, cited 2 Ves. jun. 213, 236; *Masters v. Masters*, 1 P. W. 423; *Brudenell v. Boughton*, 2 Atk. 268, 273, 274, cited 2 Ves. jun. 236; *Lord Inchiquin v. French*, Amb. 33, 41, 1 Cox, 1; *Hannis v. Packer*, Amb. 556; *Jackson v. Jackson*, 2 Cox, 35, 1 P. W. 5th ed. 423, n. 2; *Habergham v. Vincent*, 2 Ves. jun. 236; *Buckridge v. Ingram*, ib. 665; *Coxe v. Bassett*, 3 Ves. 163; *Rose v. Cunynghame*, 12 Ves. 37, 38; *Wilkinson v. Adam*, 1 Ves. & B. 446. See also *Smart v. Prujean*, 6 Ves. 560.

(j) *Habergham v. Vincent*, 2 Ves. jun. 237; *Hooper v. Goodwin*, 18 Ves. 167.

(k) *Habergham v. Vincent*, 2 Ves. jun. 236; and see 2 Atk. 274, and 12 Ves. 37, 38.

(l) *Masters v. Masters*, 1 P. W. 423; *Hannis v. Packer*, Amb. 556.

(m) *Hyde v. Hyde*, 1 Ch. Rep. 155; *Masters v. Masters*, 1 P. W. 423; *Brudenell v. Boughton*, 2 Atk. 273, 274; *Jackson v. Jackson*, 2 Cox, 35, 1 P. W. 5th ed. 423, n.

(n) *Hannis v. Packer*, Amb. 556.

(o) *Masters v. Masters*, 1 P. W. 423.

(p) *Bonner v. Bonner*, 13 Ves. 379.

estate, although all the legacies given to the same persons by the will are revoked by that codicil.(g)

An important distinction is to be noticed between a will, which itself charges future legacies, and a will that reserves a power to charge by a future instrument. For although when a will, executed according to the statute, charges real estate, in aid of the personalty, with the payment of legacies, a legacy given by a codicil, that is not so executed, may be a charge on the real estate; yet if the will does not itself make this charge, but expresses the intention to be, to effect the charge by a future instrument; as where a person devised all his real and personal estate in the island of G., upon trust, among other purposes, "to pay off and discharge all such annuities, legacies, or bequests, as I shall give or bequeath to be paid out of and from, or charge and make chargeable upon, my real or personal estate in the said island of G., by my will, or by any codicil thereto, or by any writing at any time hereafter signed by me, or in my own hand-writing, whether witnessed or not;" in these cases of an attempt to reserve by a will duly executed a power to charge by an instrument not duly executed, if a legacy or annuity is bequeathed by a codicil, that expresses an intention to charge it on the real estate, such legacy or annuity will not be so charged by either the will or codicil, if the latter is not executed and attested according to the statute.(r)

[*112]

*SECTION VII.

OF WITHDRAWING ONE OF TWO FUNDS CHARGED WITH LEGACIES.

If by a will a legacy is charged on land only, this legacy cannot be, under the Statute of Frauds, 29 Ch. II. c. 3, expressly revoked, except by a codicil, or other testamentary instrument, executed according to that statute.(s)

When by a will, executed according to the Statute of Frauds, a legacy, or annuity, is bequeathed out of two funds, namely, out of personal estate, and real estate, as an auxiliary fund in aid of the personalty; as where a testator bequeaths an annuity, and charges all his estates, both real and personal, with the payment of it;(t) or where he bequeaths an annuity, or legacy, and makes it payable out of the produce of the sale of the whole of his estate, both real and personal;(u) in these cases, the personalty charged with such legacy, or annuity, may be withdrawn from its liability to pay it, by a codicil that differently disposes of *all* the testator's personal estate, although this codicil is not executed according to the statute; and if this different disposition is so made, the legacy, or annuity, will still continue to be, under the will, a charge on the real es-

(g) *Jackson v. Jackson*, 1 Cox, 35.

(r) *Rose v. Cunynghame*, 12 Ves. 29.

(s) *Brudenell v. Boughton*, 2 Atk. 272; *Habergham v. Vincent*, 2 Ves. jun. 237; *Attorney General v. Ward*, 3 Ves. 331; *Hooper v. Goodwin*, 18 Ves. 167; *Becket v. Harden*, 4 M. & S. 1.

(t) *Buckeridge v. Ingram*, 2 Ves. jun. 652, 666.

(u) *Sheddon v. Goodrich*, 8 Ves. 483; *Attorney General v. Ward*, 3 Ves. 328, 330. See *Hooper v. Goodwin*, 18 Ves. 156.

tate, notwithstanding the personalty is discharged by the codicil.(v) In *Buckeridge v. Ingram*, the personal estate was during a life only discharged of an annuity, the testator having by a codicil bequeathed all his personal estate to E. M. for her life.(w)

*SECTION VIII.

[*113]

OF REVOKING BY A CODICIL, NOT EXECUTED ACCORDING TO THE STATUTE,
LEGACIES CHARGED BY THE WILL ON REAL ESTATE.

It has been mentioned that a legacy charged on land only cannot be, under the Statute of Frauds, expressly revoked, except by a testamentary instrument executed according to that statute.(x) If, however, a legacy is not charged on land only, but is payable first out of personal estate, and the land is, as an auxiliary fund in aid of the personalty, charged with the payment of it; in this case, it appears, the whole legacy, or part only, may be revoked by a codicil, that is not executed according to the statute, as by a codicil only signed by the testator, and not attested by any witness.(y) But here an important distinction seems to have been created, between a revocation of the whole legacy, and a revocation of a part only. If the whole legacy is revoked by such a codicil, then the effect of the codicil is to discharge the personal property, and to leave the whole legacy a charge on the real estate.(z) But if a part only of the legacy is revoked, as if a legacy of 400*l.* given by the will is by the codicil reduced to 100*l.*, in this case the effect of the codicil is not to leave the whole legacy, or 400*l.*, a charge on the real estate, but the part only, or 100*l.*, not revoked by the codicil. The legatee is now entitled to the reduced legacy only, or 100*l.*; and as by the will the real estate is a fund auxiliary only to the personalty, this diminished legacy will be payable first out of the personal estate, and, if this fund is deficient, out of the real estate charged in aid of it.(a) In the late case of *Mortimer v. West*, an annuity by a will made payable out of freehold, copyhold, leasehold, and *personal estates, was revoked by a codicil [*114] attested by one witness only; and it was decided that the annuity continued to be a charge on the freehold property.(b)

When a legacy is payable first out of personal estate, and is charged on real estate as an auxiliary fund in aid of the personalty, then by a codicil unattested, a substitution of either the legacy or legatee may be made; that is, by such codicil a smaller legacy may be substituted for one given by the will, and this substituted smaller legacy may be given either to the same person, who is the legatee in the will, or to a different

(v) *Buckeridge v. Ingram*, 2 Ves. jun. 652, cited 8 Ves. 500; *Sheddon v. Goodrich*, 8 Ves. 481. See also *Mortimer v. West*, 2 Sim. 274.

(w) 2 Ves. jun. 652.

(x) *Brudenell v. Boughton*, 2 Atk. 272; *Habergham v. Vincent*, 3 Ves. jun. 237; *Hooper v. Goodwin*, 18 Ves. 167; *Becket v. Harden*, 4 M. & S. 1.

(y) *Brudenell v. Boughton*, 2 Atk. 268; *Mortimer v. West*, 2 Sim. 274. See also *Buckeridge v. Ingram*, 2 Ves. jun. 652; *Sheddon v. Goodrich*, 8 Ves. 481; and *Attorney General v. Ward*, 3 Ves. 327.

(z) *Mortimer v. West*, 2 Sim. 274.

(a) *Brudenell v. Boughton*, 2 Atk. 268.

(b) 2 Sim. 274.

person. And also by such a codicil the original legacy, bequeathed by the will, may be given to a different person, substituted in the place of the original legatee. And notwithstanding this substitution of either the smaller legacy, or the legatee, in the one case the legacy substituted by the codicil, and in the other the legacy given by the will, will still be a charge on the real estate in aid of the personalty.(c)

SECTION IX.

OF SUBSTITUTING AND ADDING LEGACIES BY A CODICIL.

IF by a will a legacy is charged on real estate only, as if made payable out of the produce of land devised to be sold, and by a codicil that legacy is *revoked*, and a legacy of the same, or a less, sum is *substituted* in the place of the legacy given by the will, and the legacy so given by the codicil is bequeathed to either the same or a different person, and the codicil is silent on the fund, out of which the legacy given by it is to be paid, such substituted legacy is construed to be, by the will, charged on the real estate only. And if given to a charity, it will consequently be void under the Statute of Charitable Uses.(d) So, if by a will a legacy is charged on real estate only, and by a codicil a sum of money is be-
 [*115] queathed to the same legatee, and added to the legacy given by the will, as by the words, "I give to my niece the farther sum of 200*l.*, in addition to what I have given her by my will," and the codicil does not mention the fund out of which this latter legacy is to be paid, such legacy will not be payable out of the testator's personal estate, but, like the one to which it is added, out of his real estate.(e) Yet to charge the real estate with such an additional legacy, the codicil must, it is presumed, be executed and attested according to the Statute of Frauds.(f)

The cases mentioned depend on substitution and addition. A sum of money, given by a codicil, may be an original legacy, wholly independent of the will, although the codicil puts this legatee in the place of one named in the will. And between a substituted legacy, as of a less sum for a greater, or one person for another, and an original legacy, there is this important difference;—a *substituted* legacy is, *primâ facie*, attended with the same incidents, that belong to the legacy, the place of which it supplies.(g) A legacy substituted for another, given free from the legacy duty, has, accordingly, been held to be payable free from that duty.(h) But an *original* legacy is not so *primâ facie* stamped with another's nature. And, therefore, where a person bequeathed to M. Y. 20,000*l.*, which he directed to be paid free of the legacy duty, and this

(c) *Brudenell v. Boughton*, 2 Atk. 268; *Attorney General v. Ward*, 3 Ves. 327.

(d) *Leacroft v. Maynard*, 3 Bro. C. C. 233, 1 Ves. jun. 279. See also 6 Madd. Rep. 31.

(e) *Crowder v. Clowes*, 2 Ves. jun. 449.

See also 6 Madd. Rep. 31, and *Long v. Long*, 3 Ves. jun. 286, n.

(f) See *Brudenell v. Boughton*, 2 Atk. 272; *Habergham v. Vincent*, 2 Ves. jun. 237; and *Hooper v. Goodwin*, 18 Ves. 167.

(g) 6 Madd. Rep. 31.

(h) *Cooper v. Day*, 3 Mer. 154.

legacy lapsed by the death of M. Y. in the testator's life-time, and afterwards the testator made the following codicil,—“Having since the date of my will lost my daughter M. Y. by death, I do, instead of the legacies bequeathed to her by my said will, which are now lapsed, give and bequeath to her husband, R. Y., the sum of 20,000*l*.;” Sir J. Leach decided, that the words of this codicil did not create a substitution, but gave an original legacy, and that therefore the husband, R. Y., was not entitled to have the duty on his legacy paid out of the testator's estate. And, on appeal, this judgment was affirmed by Lord Lyndhurst.⁽ⁱ⁾

*SECTION X.

[*116]

OF LEGACIES CHARGED ON LAND DEVISED FOR LIFE, WITH REMAINDERS OVER; OR CHARGED ON A REMAINDER OR REVERSION IN FEE, EXPECTANT ON AN ESTATE FOR LIFE.

WHEN land is devised for life, with remainders over, and legacies are charged on the land, the terms of this charge most commonly make them payable out of all the estates, both in possession and in remainder. In a case where land was devised for life, remainder for life, remainder in fee, “charged and chargeable with 100*l*. a piece to the testator's six nieces,” Lord Hardwicke stated, “The general rule is, that ‘charged and chargeable’ runs over all the estate, as well particular as the fee; as suppose at the end the testator had said, ‘charged with all my debts,’ it would be a charge on all.”^(j)

Legacies charged on land have, on the intention collected from the whole of the particular will, been held to be payable, in several cases, out of the remainders as well as the estate for life,^(k) and in others out of the estate for life as well as the remainders.^(l) In two instances they have been held to be payable out of the remainders as well as the estate for life, notwithstanding the tenant for life was expressly named to pay them.^(m) It is an argument that the estate in possession, or estate for life, was meant to be charged, that the legacies are made payable within a certain time, as twelve months after the testator's death.⁽ⁿ⁾ When legacies are a charge on a reversion or remainder in fee, expectant on an estate for life, and are by the will directed to be paid within a limited time, a Court of Equity will decree them to be raised, during the life of the tenant for *life, by a sale of such reversion or remainder [*117] in fee.^(o) In a case in which a legacy was bequeathed “to be paid on the land called T., situate in the parish of M.,” and of which land the testator was seised of the reversion in fee, expectant on an estate for life, and the testator devised the same land by his will, the legacy was

(j) *Chatteris v. Young*, 6 Madd. 30, 2 Russ. 168.

(k) 1 Ves. 168.

(l) *Sadd v. Carter*, Prec. Ch. 27, 2 Eq. Cas. Abr. 370; *Tompkins v. Tompkins*, Prec. Ch. 397; *Bridgman v. Dove*, 3 Atk. 201.

(i) *Jones v. Selby*, Prec. Ch. 288; *Carter v. Carter*, 1 Ves. 168.

(m) *Sadd v. Carter*, Prec. Ch. 27; *Bridgman v. Dove*, 3 Atk. ed. Sand. 201, n. (1).

(n) 1 Ves. 168, 169; Prec. Ch. 289.

(o) *Bacon v. Clerk*, 1 P. W. 478, Prec. Ch. 500; *Carter v. Carter*, 1 Ves. 168.

decreed to be raised by sale or mortgage, during the life of the tenant for life.^(p)

When legacies are charged on land devised for life, with remainders over; before they are paid, the tenant for life is obliged to keep down, out of his estate for life, the interest on them;^(q) and if, to pay the principal, the land is mortgaged, the tenant for life is, like other tenants for life of land mortgaged,^(r) bound to keep down, out of his life estate, the interest of the mortgage money.^(s)

SECTION XI.

PURCHASE OF ESTATE CHARGED.

WHEN legacies only, as distinguished from debts and legacies, are by a will made payable out of real estate beneficially devised, and the estate is sold by the devisee to a purchaser, who before his money was paid,^(t) or even before the execution of the conveyance, and after the purchase-money paid,^(u) had notice of the will; notwithstanding such sale, the legacies continue to be a charge on the estate, and in equity, accordingly, the purchaser is bound to see his money applied in payment of them; and if they are not paid, the Court will, against the purchaser, decree the legacies to be paid out of the estate bought by him.^(v)

[*118] *A purchaser of an estate charged with legacies is, however, not liable to see them paid, if the will creates a trust or power to sell, and authorizes the trustees to sign receipts for the purchase-money; and in this case the purchaser will not be responsible for the application of his money, although the parties entitled to it are infants.^(w)

But if real estate beneficially devised is charged with legacies, some of which are given to adult persons, and others to infants, and the adult legatees are entitled to require the estate to be sold to pay their legacies, notwithstanding the infancy of the other legatees, and the devisee accordingly sells, and the purchaser is liable to see his money applied to pay the legacies; in such a case it appears from *Dickenson v. Dickenson*, that if a part of the purchase-money is, to satisfy the infants' legacies when they shall be payable, invested in Government securities, this investment will not take from the infants the security of the estate sold; which, it seems, will still be liable to make up any deficiency in the legacies, if the fund created by the money now raised and invested is, at the time

(p) *Davies v. Davies*, Dan. 84.

(q) *Bridgman v. Dove*, 3 Atk. ed. Sand. 201, n. (2); *Jones v. Selby*, Prec. Ch. 288.

(r) *Revel v. Watkinson*, 1 Ves. 93; *Amesbury v. Brown*, ib. 480; *Tracy v. Lady Hereford*, 2 Bro. C. C. 128.

(s) *Bridgman v. Dove*, 3 Atk. ed. Sand. 201, n. (2). See *Hayes v. Hayes*, 1 Ch. Cas. 222.

(t) *Tourville v. Naiah*, 3 P. W. 307.

(u) *Wigg v. Wigg*, 1 Atk. 382, 1 West Cas. T. Hardw. 677.

(v) *Smith v. Alterly*, 2 Freem. 136; *Drapers' Company v. Yardley*, 2 Vern. 662; *Wigg v. Wigg*, 1 Atk. 382, 1 West Cas. T. Hardw. 677; *Manning v. Herbert*, Amb. 575. See also *Tompkins v. Tompkins*, Prec. Ch. 399; *Wilson v. Stafford*, Amb. 181; *Lord Braybrooke v. Inskip*, 8 Ves. 417, 420, 421, 432.

(w) *Sowarsby v. Lacy*, 4 Madd. 142.

when the infants become entitled to receive their legacies, fallen in value, and inadequate to produce the amount of them.(x)

When, after a sale of land charged with legacies, a purchaser, who had notice of the will, is decreed to pay them, the Court will afford him relief by a decree over against the devisee from whom he purchased, if on an inquiry whether the devisee had received from the purchaser the whole of the purchase-money, or had made a deduction for the legacy, the result is against the devisee, that the whole money was received by him.(y)

*SECTION XII.

[*119]

OF LEGAL AND EQUITABLE CHARGES.

A CHARGE of a legacy on land devised is sometimes a charge *at law*, and sometimes a charge *in equity only*.(z)

It is a charge *at law*, if, on non-payment of the legacy, possession of the land may be recovered from the devisee by an action of ejectment;(a) as when the land is devised on condition to pay a legacy, and the devise is a condition and not a limitation, and, on non-payment, an ejectment may be brought by the testator's heir at law;(b) or when the land is devised to one of two co-heiresses of the testator, and the devise is not a condition but a limitation, and, on non-payment, an ejectment may, for a moiety of the land, be brought by the co-heir to whom the land is not devised;(c) or when the land is Borough English, descendible to the youngest son, and is devised to the testator's eldest son and heir at law, and the devise is not a condition but a limitation, and, on non-payment, an ejectment may be brought by the heir in Borough English;(d) or when the land is devised on condition to pay the legacy, and a right of entry given to the legatee makes the devise a limitation, and, on non-payment, entitles the legatee to bring an ejectment;(e) or when the legacy is bequeathed out of personal estate, and land devised is, as an auxiliary fund in aid of the personalty, charged with the payment of it, and a right to enter, and to hold until payment, is given to the legatee.(f)

A legacy charged on land seems also to be a charge at law, if the legatee can support an action of debt against the terre-tenant for the money. Holt, C. J., is reported to have said—"If *money be devised [*120] out of lands, sure the devisee may have debt against the owner of the land for the money, upon the statute 32 Henry VIII., of wills; for wherever a statute enacts any thing, or prohibits any thing, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him

(x) 3 Bro. C. C. 19.

(y) Newman v. Kent, 1 Mer. 240.

(z) 1 Atk. 383; 3 Atk. 322.

(a) Emes v. Hancock, 2 Atk. 508; Sherman v. Collins, 3 Atk. 322; Gugelman v. Dupont, 1 West Cas. T. Hardw. 579.

(b) Hodgson v. Rawson, 1 Ves. 47.

(c) Tunstall v. Brachen, Amb. 167, 1 Bro. C. C. 124, n.

(d) Wellock v. Hammond, Cro. Eliz. 204, 3 Co. 20 b.

(e) Emes v. Hancock, 2 Atk. 507; Embrey v. Martin, Amb. 230; Manning v. Herbert, ib. 575.

(f) Sherman v. Collins, 3 Atk. 319, 322.

contrary to law, by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity; and the action must be against the terre-tenant.”(g) On this opinion Lord Ellenborough has made the observation,—“That in the case of a legacy payable out of land, unless the legatee had his remedy by action of debt, founded on the statute, he would be wholly without remedy in the Courts of Common Law.”(h)

A charge of a legacy seems to be merely *equitable*, or a charge only in *equity*, when, on non-payment of the money, the legatee has no remedy except in a Court of Equity.(i) An example of an equitable charge seems to be furnished by a case, in which an equity of redemption in fee of an advowson in gross was devised on condition to pay a legacy, and the devisee of the advowson died in the lifetime of the testator.(j) And if a reversion in fee, expectant on an estate for life, is devised to the testator’s heir at law, on condition to pay a legacy, such legacy is, during the life of the tenant for life, an equitable charge only.(k) If land is devised to A. in fee, on condition to pay certain legacies, and, by a right of entry given to the legatees, the devise is made a conditional limitation, and A. dies in the testator’s lifetime; here, although the devise to A. lapses in favour of the testator’s heir at law, yet, if the legacies are not now a charge on the land at law, they are, it is decided, in equity, and a Court of Equity will decree the heir to pay them.(l)

[*121]

*SECTION XIII.

OF THE FAILURE OF REAL ESTATE CHARGED WITH LEGACIES.

REAL estate charged with legacies may fail to pay them,

1. When the testator’s personalty is charged on failure of that real fund; and

2. When the real estate alone is charged.

1. Legacies charged on land, made the first fund liable to pay them, have, on the intention collected from the whole will taken together, been held to be payable out of the testator’s personal property, as an auxiliary fund in aid of the real estate, partly failing to pay them.(m)

When legacies charged on land are meant to be, what in the Civil Law are called *demonstrative* legacies, the legatees may, on failure of the land, be entitled to be paid out of the testator’s personal assets.(n) A demonstrative legacy seems to be a general legacy of this kind; namely, one that is payable first from a particular fund, to which the testator points as the first security to pay it, and which legacy, failing this

(g) 6 Mod. 26; 2 Lord Raym. 937; 2 Salk. 415; Cas. T. Holt, 419.

(h) 4 M. & S. 119.

(i) Sherman v. Collins, 3 Atk. 322.

(j) Webb v. Sutton, Nels. 175. See also Hills v. Wirley, 2 Atk. 607, and Oke v. Heath, 1 Ves. 135, 141.

(k) Bacon v. Clerk, Prec. Ch. 500, 1 P. W. 478.

(l) Wigge v. Wigge, 1 West Cas. T. Hardw. 677, 1 Atk. 382.

(m) Strode v. Ellis, Nels. 203; Whaley v. Cox, 2 Eq. Cas. Abr. 549.

(n) Fowler v. Willoughby, 2 Sim. & St. 354.

security, is payable out of the testator's general personal assets.(o) An example of a demonstrative legacy is, a sum of money bequeathed, and to pay which a particular debt owing to the testator, as on bond, is in the will pointed at as the first security or fund for the purpose; and, failing this fund, as by payment of the debt in the testator's lifetime, or by the insolvency of the debtor after the testator's death, the legacy so secured by the debt is payable out of the general personal assets of the testator.(p) A legacy of a sum, that is the full amount of the debt, may be demonstrative;(q) and so may a legacy of a sum less than the debt, or of a sum out *of it.(r) When, however, the full amount of a [*122] debt is bequeathed, the terms of the bequest are often held to make the legacy specific.(s) And it may be specific, although in the bequest the sum of money, which constitutes the debt, is expressly named.(t) A legacy of a sum of money out of a debt may also be specific.(u) Between the two kinds of legacy, specific and demonstrative, the distinction is extremely important. For when a debt, or part of a debt, is bequeathed, and the legacy is construed to be specific, here, although, by some circumstances which affect the debt, the legacy may not be construed to be adeemed,(v) yet if the money owed, and so specifically bequeathed, is, either by the voluntary act of the debtor, or by demand or compulsion from the testator,(w) paid in the testator's life-time, by this payment the legacy is adeemed;(x) and if the debt was paid by demand or compulsion, a Court of Equity will not look at the intention with which it was called in, but simply inquires if the legacy is specific, and if it is, construes it to be adeemed by such payment of the debt.(y) In the case of a demonstrative legacy, although the fund pointed at as a security to pay it fails, as where *this security is a debt [*123] which in the life-time of the testator is paid, and paid either by the voluntary act of the debtor, or by demand or compulsion from the testator,(z) yet, notwithstanding this failure of the security, the legacy

(o) 3 Bro. C. C. 109; 4 Ves. 565; 2 Sim. & St. 358.

(p) Pawlet's case, T. Raym. 335; Roberts v. Pocock, 4 Ves. 150.

(q) Pawlet's case, above. See also Le Grice v. Finch, 3 Mer. 50.

(r) Theobald v. Wynn, and Squibb v. Chicheley, cited in Pawlet's case, T. Raym. 335; Savile v. Blacket, 1 P. W. 779; Ford v. Fleming, 2 Stra. 823, 2 P. W. 469, 1 Eq. Cas. Abr. 302; Ellis v. Walker, Amb. 310; Roberts v. Pocock, 4 Ves. 150.

(s) Lord Castleton v. Lord Fanshaw, 1 Eq. Cas. Abr. 298, cited 4 Ves. 566; Ashburner v. Macguire, 2 Bro. C. C. 108; Stanley v. Potter, 2 Cox, 180; Chaworth v. Beech, 4 Ves. 555; Innes v. Johnson, ib. 568.

(t) Ashburner v. Macguire, 2 Bro. C. C. 108, 111; Stanley v. Potter, 2 Cox, 180; Chaworth v. Beech, 4 Ves. 555.

(u) Hambling v. Lister, Amb. 401; Badrick v. Stevens, 3 Bro. C. C. 431. See Smith v. Fitzgerald, 3 Ves. & B. 5.

(v) Ashburner v. Macguire, 2 Bro. C. C. 108; Coleman v. Coleman, 2 Ves. jun., 639, cited 4 Ves. 574.

(w) A distinction once existed between a voluntary and compulsory payment. Earl of Thomond v. Earl of Suffolk, 1 P. W. 464; Crockat v. Crockat, 2 P. W. 165; Rider v. Wager, ib., 331; Ashton v. Ashton, 3 P. W. 385; Partridge v. Partridge, Cas. T. Talb. 228; Birch v. Baker, Mos. 375; Hambling v. Lister, Amb. 401; Lawson v. Stutch, 1 Atk. 508, 1 West Cas. T. Hardw. 326; Drinkwater v. Falconer, 3 Ves. 624; Coleman v. Coleman, 2 Ves. jun. 640. But this distinction seems to be now exploded. Ashburner v. Macguire, 2 Bro. C. C. 110; Innes v. Johnson, 4 Ves. 574.

(x) Ashburner v. Macguire, 2 Bro. C. C. 110; Stanley v. Potter, 2 Cox, 180; Humphreys v. Humphreys, ib. 184, 185; Badrick v. Stevens, 3 Bro. C. C. 431; Fryer v. Morris, 9 Ves. 360. These cases appear to overrule Hambling v. Lister, Amb. 401, cited from Reg. B. 13 Ves. 336.

(y) Stanley v. Potter, 2 Cox, 180; Barker v. Rayner, 5 Madd. 217, 218.

(z) Attorney General v. Parkin, Amb. 569; Ashburner v. Macguire, 2 Bro. C. C. 110.

is not lost to the legatee, but is payable to him out of the testator's general personal assets.(a)

In *Fowler v. Willoughby*, a person, who had contracted for the purchase of an estate, by his will gave to trustees a sum of 1400*l.*, to be raised by the sale of that estate, describing it as the estate which he had lately purchased of Mr. F.; upon trust to place the 1400*l.* out upon good security; and, out of the interest thence arising, to maintain and educate his grandson, J. F., until he should attain the age of twenty-one years; and when he should attain that age, he willed that his grandson should receive 800*l.* as his share of the 1400*l.* And he gave to his grandson T. F., when he should attain the age of twenty-one years, the remaining sum of 600*l.*, and all the interest and profits which should have arisen from the 1400*l.*, over and above the maintenance and education of his grandson, J. F. And he gave all the residue of his personal estate to his son, T. W., whom he appointed sole executor of his will. After the testator's death, it was found that the contract for purchase could not be enforced against his assets; and it then became a question whether the legacy to J. F. could take effect, although it could not be raised in the manner directed by the testator. Sir J. Leach decreed the legacy to be paid out of the testator's general estate; stating that this was neither a *legatum nominis*, nor a *legatum debiti*, but a pecuniary legacy with a particular security, which in the Civil Law was termed a demonstrative legacy, and that our law followed the Civil Law in giving effect to such a legacy, where the particular security intended by the testator happened to fail.(b)

[*124] *2. When legacies are not demonstrative, and real estate alone is charged with them, then if this fund partly or wholly fails, the legatees are not entitled to be paid out of the testator's personal assets.(c) Accordingly it is said, "If a man gives a legacy, and chargeth it upon Black Acre; although this be not sufficient to answer the full value of the legacy, yet it shall not be charged upon the personal estate."(d) And in *Colchester v. Lord Stamford* it was said by Trevor, "If a man hath two daughters, and deviseth to one 1000*l.* out of his real estate, and to another 1000*l.* out of his personal estate, there if the real estate be evicted, that legacy is lost, and shall never come into an average with the other upon the personal estate."(e)

In *Gittins v. Steele*, a legacy of 7000*l.* was charged on certain freehold and leasehold estates, which the testator devised in trust for sale, and in trust to pay that legacy out of the purchase-money. After making his will, the testator sold some of the estates; and the money produced by a sale of the remainder, was insufficient to satisfy the legacy of 7000*l.* And Lord Eldon, on the intention to be collected from the whole will taken together, decided that the testator's general personal estate was

(a) *Pawlet's case*, T. Raym. 335; *Savile v. Blacket*, 1 P. W. 779; *Orme v. Smith*, 1 Eq. Cas. Abr. 302, Gilb. Eq. Rep. 82, 2 Vern. 681; *Roberts v. Pocock*, 4 Ves. 150. See likewise *Pettward v. Pettward*, Cas. T. Finch, 152; *Attorney General v. Parkin*, Amb. 568, cited 2 Bro. C. C. 113, 2 Cox, 182, 2 Ves. jun. 640, and 4 Ves. 566; also *Coleman v. Coleman*, 2 Ves. jun. 639, and *Le Grice v. Finch*, 3 Mer. 50.

(b) 2 Sim. & St. 354.

(c) *Arnald v. Arnald*, 1 Bro. C. C. 401; *Brydges v. Phillips*, 6 Ves. 571; *Gittins v. Steele*, 1 Swanst. 29, 30. See also *Amesbury v. Brown*, 1 Ves. 482; *Spurway v. Glynn*, 9 Ves. 483; and *Hancox v. Abbey*, 11 Ves. 185.

(d) 2 Freem. 22, Ca. 21.

(e) 2 Freem. 124.

not subject to pay it. "Entertaining," said his Lordship, "no doubt that the intention of the testator has been frustrated by a subsequent sale of a part of his estates, I am not authorized to advert to that fact as affecting the construction of the will. I am bound, as a judge, to assume, that the testator supposed that he should leave, at his decease, freehold and leasehold estates sufficient for the payment of the legacy of 7000*l.*; and I protest against being understood to give my judgment on the ground of the subsequent sale. My duty is, to apply the funds which at his death are applicable, by the operation of the will, to the payment of this legacy. If they are insufficient, the Court, whatever may be the hardship of the case, cannot supply other funds."(*f*)

*SECTION XIV.

[*125]

OF THE SINKING OF A LEGACY INTO THE INHERITANCE, ON THE DEATH OF THE LEGATEE BEFORE THE TIME OF PAYMENT.

WHEN, out of personal estate, (which includes leaseholds for years),(*g*) a legacy is bequeathed to A.; it is given to him on a condition precedent, if the bequest is to him at the age of twenty-one,(*h*) or to him if,(*i*) or when,(*j*) or as soon as,(*k*) he attains twenty-one. And, because these expressions, or the like terms of contingency, create a condition precedent, if A. dies before the age of twenty-one, his legacy will sink into the estate, and will not pass to his personal representative.(*l*) But in these cases the legacy will not sink into the estate, and, on A.'s death before twenty-one, will go to his personal representative, if the context of the bequest qualifies the condition, and makes the legacy vested before his death.(*m*)

If, out of personal estate, a legacy is bequeathed to A. at a future day, as to A. at his age of twenty-one, or when he attains twenty-one, with interest until that time, the bequest of interest is evidence that the legacy is intended to be a present gift, to be paid hereafter, and the legacy is interpreted to be vested at the death of the testator,(*n*) unless clearly intended to be contingent, *notwithstanding the bequest of interest.(*o*) There is, however, a distinction between in- [*126]

(*f*) 1 Swanst. 24.(*g*) *Atkins v. Hiccocks*, 1 Atk. 500; *Yates v. Pettipiece*, 1 Ld. Raym. 508, 12 Mod. 276.(*h*) *Clobberie's case*, 2 Ventr. 342; *Onslow v. South*, 1 Eq. Cas. Abr. 295, Ca. 6, cited 3 Bro. C. C. 473; *Stapleton v. Cheales*, Prec. Ch. 317, cited 6 Ves. 245; *Fonereau v. Fonereau*, 3 Atk. 645, 1 Ves. 118.(*i*) Prec. Ch. 318; 6 Ves. 245.(*j*) Prec. Ch. 318; 6 Ves. 245; *Anon.* 1 Freem. 420, Ca. 559. On the words 'when' and 'if,' see 6 Ves. 243—249, 9 Ves. 230, and 3 Bro. C. C. 473.(*k*) *Knight v. Knight*, 2 Sim. & St. 490.(*l*) Authorities in the last four notes.(*m*) *Fonereau v. Fonereau*, 3 Atk. 645,1 Ves. 118; *Hanson v. Graham*, 6 Ves. 239.(*n*) *Clobberie's case*, 2 Ventr. 342; *Lampen v. Clowbery*, or *Clobberie v. Lampen*, S. C., 2 Ch. Cas. 155, 2 Freem. 24; *Anon. Skinn.* 147; *Stapleton v. Cheales*, or *Cheale*, Prec. Ch. 317, 2 Vern. 673; *Hoath v. Hoath*, 2 Bro. C. C. 3; *Hanson v. Graham*, 6 Ves. 239. See also *Collins v. Metcalfe*, 1 Vern. 462; *Walcott v. Hall*, 2 Bro. C. C. 305; *Dodson v. Hay*, 3 Bro. C. C. 404; *Booth v. Booth*, 4 Ves. 399; and *Jones v. Mackilwain*, 1 Russ. 220; also *Neale v. Willis*, Barn. Ch. Rep. 43.(*o*) *Batsford v. Kebbell*, 3 Ves. 363; *Knight v. Knight*, 2 Sim. & St. 490.

terest and maintenance; for notwithstanding a bequest of maintenance until A. is of age, the legacy will continue to be contingent until he attains twenty-one, unless there is farther evidence in the will to make it vested before. (p)

It is important to distinguish between a legacy contingent until a future day, and a legacy not payable until a future day. The latter may be vested at the death of the testator, although to be paid hereafter. If, out of personal estate, a legacy is bequeathed to A., to be paid at a future period, as to A., to be paid at the age of twenty-one, (q) or to A., to be paid when he attains twenty-one, (r) or to A., to be paid at the death of a third party, to whom a preceding life estate in the property is bequeathed; (s) in these, and similar (t) cases, the legacy of A. will be vested at the death of the testator, unless there are farther words in the will to make it contingent.

The distinction noticed between a legacy bequeathed on a condition precedent, and a legacy vested presently, and to be paid hereafter, is thus stated in Clobberie's case, the leading authority on this point—"If money be bequeathed to one at his age of twenty-one years; if he dies before that age the money is lost. On the other side, if money be given to one, to be paid at the age of twenty-one years; there, if the party dies before, it shall go to the executors." (u)

[*127] *If, out of land, (v) a legacy is bequeathed to A. on a contingency, as to A. at his age of twenty-one; if A. dies before the contingent event takes place, as before his age of twenty-one, the legacy will sink into the land, for the benefit of the heir, *natus* or *factus*, (w) and will not pass to A.'s personal representative. (x) And if, out of land, a legacy is bequeathed to A., to be paid at a certain age, as to A., to be paid at twenty-one; if A. dies before the time of payment, the legacy will here likewise sink into the land for the benefit of the heir. (y) And whether the legacy is given to A. at twenty-one, or to A.

(p) *Pulsford v. Hunter*, 3 Bro. C. C. 416; *Hanson v. Graham*, 6 Ves. 249. See also 1 Atk. 501, and *Harrison v. Buckle*, 1 Stra. 238.

(q) *Clobberie's case*, 2 Ventr. 342; *Anon.* 1 Freem. 420; *Anon.* 2 Freem. 64; *Chester v. Painter*, 2 P. W. 336; *Laundy v. Williams*, ib. 478; *Roden v. Smith*, Ambl. 588; *Walcott v. Hall*, 2 Bro. C. C. 305; *Bolger v. Mackell*, 5 Ves. 509.

(r) *May v. Wood*, 3 Bro. C. C. 471; *Anon.* 2 Freem. 89.

(s) *Corbett v. Palmer*, 2 Eq. Cas. Abr. 548, and 544, in marg.; *Hatch v. Mills*, 1 Eden, 342; *Weedon v. Fell*, 2 Atk. 123; *Monkhouse v. Holme*, 1 Bro. C. C. 298; *Benyon v. Maddison*, 2 Bro. C. C. 75; *Scurfield v. Howes*, 3 Bro. C. C. 90; *Molesworth v. Molesworth*, 3 Bro. C. C. 5, 4 Bro. C. C. 408; *Roebuck v. Dean*, 4 Bro. C. C. 403; *Skey v. Barnes*, 3 Mer. 335. See also *Sturgess v. Pearson*, 4 Madd. 411, and *Maitland v. Chalie*, 6 Madd. 243.

(t) Bro. Abr. tit. Devise, pl. 27; *Rowley v. Lancaster*, 2 Ch. Rep. 25; *Lane v. Goudge*, 9 Ves. 225; *Love v. L'Estrange*, 5 Bro. P. C. ed. Toml. 59, cited 3 Bro. C. C. 472, and

4 Ves. 408; *Dodson v. Hay*, 3 Bro. C. C. 404. See also *Neale v. Willis*, Barn. Ch. Rep. 43.

(u) 2 Ventr. 342; on which distinction, see also 2 Vern. 417; 2 P. W. 612; 1 Atk. 501, 512; 2 Ves. 263; 1 West Cas. T. Hardw. 701; 1 Bro. C. C. 123, 3 Ves. 543; 5 Ves. 513; 6 Ves. 245; and 9 Ves. 230.

(v) By land is here meant real estate (1 Atk. 503; 1 West Cas. T. Hardw. 701; 2 P. W. 610; 2 Ld. Raym. 937; 5 Ves. 513,) which excludes leaseholds for years. Yet if a term of years is created out of the inheritance, in trust to raise a sum of money, this money is payable out of land, or real estate. *Bond v. Brown*, 2 Ch. Cas. 165; *Lady Pawlett v. Lord Pawlett*, 1 Vern. 321. See also 2 Freem. 244, 245.

(w) 2 P. W. 277, 610; 1 Atk. 486; 2 Ves. 207.

(x) On legacies by a father to his child, *Taylor v. Wood*, Nels. 193; *Carter v. Bletsoe*, Prec. Ch. 267, Gilb. Eq. Rep. 11; *Smith v. Avery*, 1 Eq. Cas. Abr. 269; *Phipps v. Lord Mulgrave*, 3 Ves. 613.

(y) On legacies by a father to his child, *Smith v. Smith*, 2 Vern. 92; *Yates v. Fetti-*

to be paid at twenty-one, it seems to be clear that, notwithstanding interest is bequeathed to be paid during the contingency, the legacy will sink into the land, if A. dies under age.(x)

When a legacy given by a father to his child, and made payable out of land, is bequeathed to the child at a certain age, or to *him, [*128] to be paid at a certain age, as at the age of twenty-one, a Court of Equity, in interpreting this bequest, concludes that the parent thought that, if the child did not live till such time, it would not want its portion or legacy. And the like interpretation is extended to legacies to strangers. But when a legacy is bequeathed to a person, to be paid at a future day, and the mind of the testator appears to be free from the thought, that the legatee will not want the legacy, if he dies before the time of payment, then, unless by the context a future gift appears clearly to be intended, the bequest is interpreted to mean a present gift, to be paid hereafter, and the payment of which is postponed for the convenience of the estate, or for some other reason apparent in the mind of the testator; and, in these cases, the legacy may not sink into the land, although the legatee dies before the time of payment arrives.(a) Accordingly, in the authorities referred to in the margin, a legacy has been held not to sink into the land, although the legatee died before the time of payment;(b) and, in other instances, where the legacies were payable within, or at the end of a year, or other appointed period, after the death of the testator himself,(c) or of a devisee for life of the property.(d)

When a legacy is bequeathed to A., to be paid at a day to *come, as at the age of twenty-one years, and is payable out [*129]

place, or Phetplace, 2 Vern. 416, Proc. Ch. 140, 1 Ld. Raym. 508; Jennings v. Looks, 2 P. W. 276; Boycot v. Cotton, 1 Atk. 552, 555, 1 West Cas. T. Hardw. 520; Rich v. Wilson, Mos. 68; Ord v. Ord, 2 Dick. 439; Harrison v. Naylor, 2 Cox, 247, 3 Bro. C. C. 108. On legacies to a stranger, Gawler v. Standerwick, 2 Cox, 15. That it is a general rule, that a legacy payable out of land will sink into the inheritance, if the legatee dies before the time of payment, see 3 Atk. 321, and Attorney General v. Milner, ib. 112, and in which case Fortescue, M. R., says, "With regard to children's portions, the rule of the Court has been, that where the child dies before it becomes payable, it shall sink into the land. And if the rule is, that a legacy out of land, given as a portion to a child, who dies before the contingency happens, shall go to the heir, and not to the representative of the child, I think it is much stronger where the legacy is given to a stranger payable out of land." Ib. 115.

(x) On legacies by a father to his child, Carter v. Bletsoe, Rich v. Wilson, and Boycot v. Cotton, above. On legacies to a stranger, Gawler v. Standerwick, above.

(a) 2 P. W. 277; 3 P. W. 174; 2 Atk. 128; Barn. Ch. Rep. 329; 3 Atk. 321; Ambl. 576; 1 Bro. C. C. 123, 124, 125.

(b) On legacies by a father to his child, Lowther v. Condon, 3 Atk. 127, Barn. Ch.

Rep. 327, cited 3 Atk. 321; Sherman v. Collins, 3 Atk. 319; Manning v. Herbert, Ambl. 575; on which case, see Belt's Supplement, to Ves. p. 38; Bayley v. Bishop, 9 Ves. 6. On legacies by a grandfather to his grandchild, Emes v. Hancock, 2 Atk. 507; Embrey v. Martin, Ambl. 230; Embry v. Marlyn, S. C., 1 Kenyon, 77. On legacies to strangers, Strickland v. Garnet, 2 Ch. Rep. 97; Hutchins v. Foy, Com. 716, cited 1 Ves. 47. Tunstall v. Brachen, Ambl. 167; Clark v. Ross, 2 Dick. 529, 1 Bro. C. C. 121, n.; Dawson v. Killet, 1 Bro. C. C. 119; Mason v. Marshall, stated ib. 122; Molesworth v. Molesworth, 3 Bro. C. C. 5, 4 Bro. C. C. 408.

(c) On legacies by a father to his child, Cowper v. Scott, 3 P. W. 119; Wilson v. Spencer, ib. 172. See Webb v. Webb, Barn. Ch. Rep. 86.

(d) On legacies by a father to his child, Pawsey v. Edgar, 2 Dick. 531, 1 Bro. C. C. 192, n.; Godwin v. Munday, 1 Bro. C. C. 191; Fry v. Fry, stated ib. 192; Thompson v. Dow, ib. 193, n.; Morgan v. Gardiner, ib. n. On legacies to strangers, Hodgson v. Rawson, 1 Ves. 44; Jeale v. Tichener, Ambl. 703, 1 Bro. C. C. 120, n., Seal v. Tichener, S. C., 2 Dick. 444. And see Hall v. Terry, 1 Atk. 503, 1 West Cas. T. Hardw. 500, cited 1 Ves. 48, and 1 Bro. C. C. 194. See likewise Weedon v. Fell, 3 Atk. 123.

of personal estate, and out of, as an auxiliary fund, the testator's real estate; here, if the legatee dies before the day of payment, the charge on the land, or other real estate, sinks into the inheritance, but the legacy still continues to be payable out of the testator's personal estate.(e)

SECTION XV.

MISCELLANEOUS POINTS OF THE GENERAL SUBJECT.

UNLESS a contrary intention appears in the will, a charge of legacies on land authorizes a Court of Equity to decree a sale, or mortgage or sale, of it, for payment of the legacies;(f) and this decree will, it seems, be made, although the testator's heir at law, to whom the land charged is devised, is an infant.(g) Also, a sale will be decreed, notwithstanding the estate charged is a reversion expectant on an estate for life.(h) In *Baines v. Dixon*, where land was devised for the payment of debts and legacies, Lord Hardwicke held that the particular terms of the will did not authorize a sale for payment of the legacies, and directed a sale for the debts, but the legacies to be paid as the yearly rents and profits should arise.(i) When a legacy is charged on real estate only, a Court of Equity will not decree it to be raised before the time of payment; "and although an equity might possibly arise to a purchaser without notice of such a charge, yet this is not an event to which the Court will look forward."(j) [*130] Where a will creates a trust "to raise money out of land, as to pay debts and legacies, and, with resemblance to a tenant by *elegit*, the trustee takes a chattel estate until the money is raised; here, if the trustee, in the execution of the trust, enters and receives the rents to an amount sufficient to discharge the trust, the estate is then, it appears, taken as having borne its burthen; and if the money is misapplied, the land is no farther chargeable, and the *cestui que trust* must take his remedy against the trustee, for the misapplication made by him.(k) From a case of this kind, the circumstances in *Gugelman v. Duport* were held to be different; and there, accordingly, Lord Hardwicke decreed an estate to bear a second time the burthen charged on it; namely, a legacy, the amount of which the trustee had raised out of the rents and profits, and died insolvent, without having satisfied any part of it.(l) Before the statute 55 Geo. III. c. 192, a charge of a legacy on a copyhold, which was not surrendered to the use of the will, was invalid,

(e) On legacies by a father to his child, *Ord v. Ord*, 2 Dick. 439; *Lowe v. Mosely*, stated 3 Ves. 140. On legacies to strangers, *Duke of Chandos v. Talbot*, 2 P. W. 601, 609, 613; *Prowse v. Abingdon*, 1 Atk. 482, 1 West Cas. T. Hardw. 312; *Van v. Clarke*, 1 Atk. 510, 1 West Cas. T. Hardw. 699; *Basset v. Basset*, 3 Atk. 203, 207; *Pearce v. Loman*, 3 Ves. 135.

(f) *Bacon v. Clerk*, 1 P. W. 478; *Miles v. Leigh*, 1 Atk. 573; *Hone v. Medcraft*, 1 Bro. C. C. 261, 265.

(g) *Mould v. Williamson*, 2 Cox, 386.

(h) *Bacon v. Clerk*, 1 P. W. 478, Prec. Ch. 500; *Carter v. Carter*, 1 Ves. 168; *Davies v. Davies*, Dan. 84.

(i) 1 Ves. 41.

(j) *Gawler v. Standerwick*, 2 Cox, 15, 18.

(k) *Carter v. Barnadiston*, 1 P. W. 505, 509, 518; *Gugelman v. Duport*, 1 West Cas. T. Hardw. 579. See also *Anon.* 1 Salk. 153; *Juxon v. Brian*, Prec. Ch. 143; *Tompkins v. Tompkins*, ib. 397; *Oldfield v. Oldfield*, 1 Vern. 336; and *Hutchinson v. Lord Massareone*, 2 Bell & B. 49.

(l) 1 West Cas. T. Hardw. 577.

except in certain cases, in which a Court of Equity would, for the benefit of the legatee, supply the surrender.(m) In *Shirt v. Westby*, a charge of another person's debts was interpreted to be a bequest of legacies out of real estate. The testator said, "I charge my real estates, situate within the township of K., with the payment of the following sums of money, or such of them as shall be unpaid at the time of my decease, and which are the debts of my late brother, J. H., deceased: to S. J. the sum of £300;" specifying the other persons and sums, in the same manner. These sums were by Lord Eldon decided to be legacies, and carrying interest, not as the debts of J. H., but as sums of money bequeathed by the testator.(n) It is important to notice a distinction between a *legacy* and a *residue*. A legacy bequeathed out of personal estate may be, and is accordingly very commonly *construed to be, [*131] charged on real estate, in aid of the personalty: but it is said, [*131] "It is true that a real estate shall never come in aid of a *residue*; but when it is a new resulting fund, it is different."(o) These words appear to mean, that real estate is never construed to be, in aid of the personalty, charged with the payment of a residue, or of a sum of money bequeathed out of a residue; yet if the residue is first, for a particular purpose, given to trustees, as to J. W. and M. W., in trust for S. for life, and after this purpose fulfilled, as after the death of S., the testator ceases to treat the same fund as residuary; in this case, a sum of money bequeathed out of it may be interpreted to be a legacy, and, like other legacies, charged on real estate in aid of the personalty.(p)

(m) *Rafter v. Stock*, 1 Eq. Cas. Abr. 123,
Ca. 12; *Palmer v. Palmer*, 2 Dick. 534.
(n) 16 Ves. 393.

(o) 3 Bro. C. C. 631.
(p) *Minor v. Wicksteed*, 3 Bro. C. C.
627.

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*CHAPTER VII.

OF AN ANNUITY DEVEISED, AND BY THE WILL CHARGED ON REAL ESTATE.

- SECT. I. *Liability of Testator's personal Estate to pay the Annuity; and on a Revocation of the Will by a Codicil.*
 II. *Liability of an Annuitant to pay Land-Tax.*
 III. *Remedy to obtain Payment of the Annuity.*
 IV. *Remedy to obtain Payment of an Annuity, charged on an Incorporeal Hereditament.*
 V. *Interest on Arrears of an Annuity.*
 VI. *Sale of the Estate Charged.*
 VII. *Charge on renewable Leaseholds.*
 VIII. *Apportionment.*
 IX. *Miscellaneous Points of the General Subject.*

SECTION I.

LIABILITY OF TESTATOR'S PERSONAL ESTATE TO PAY THE ANNUITY; AND ON A REVOCATION OF THE WILL BY A CODICIL.

IN several cases an annuity given by will has been held to be payable out of the testator's real estate, in aid of his personal estate,^(a) and, in [*133] other instances, in exoneration of the personalty.^(b) *In *Cole v. Turner*, an annuity was held to be charged on freehold, copyhold, and leasehold estates, and, it would seem, on them only.^(c) In *Brown v. Claxton*, an annuity was held to be a charge on personal estate, and, perhaps, on that only.^(d) A person by his will, executed and attested according to the Statute of Frauds, bequeathed an annuity to his daughter, and charged it on all his estate, both real and personal. And by a codicil, attested by two witnesses only, he gave all his real and personal estate to E. M. for life. On this case it was held, that under the will the annuity was a charge on the real estate, in aid of the personalty; that by the codicil the personal estate was, during the life of E. M., exempted from the payment of the annuity; and that, notwithstanding the codicil, the annuity continued to be a charge on the testator's real estate.^(e) And, in another case also, an annuity bequeathed by a will, and charged on real and personal estate, was held to remain a charge

(a) *Elliot v. Hancock*, 2 Vern. 143; *Quintine v. Yard*, 1 Eq. Cas. Abr. 74; *Aubrey v. Middleton*, 4 Vin. Abr. 460, 2 Eq. Cas. Abr. 497; *Attorney General v. Lady Downing*, 1 Dick. 414, 417, Amb. 572; *Buckeridge v. Ingram*, 2 Ves. jun. 652; *Sheddon v. Goodrich*, 8 Ves. 481, 497, 501; *Fitzgerald v. Field*, 1 Russ. 416, 428; *Lushington v. Sewell*, 1 Sim. 435, 477. See *Joyce's case*, Nels. 155; *Oldham v. Litchford*, or *Litchfield*, 2 Freem. 284, 2 Vern. 506; *Rigbie's case*, Ley, 61; and *Brown v. Claxton*, 3 Sim. 225.
 (b) *Cheesman v. Partridge*, 1 Atk. 436, 9 Mod. 213; *Ex parte Morgan*, 10 Ves. 101.
 (c) 4 Russ. 376.
 (d) 3 Sim. 225.
 (e) *Buckeridge v. Ingram*, 2 Ves. jun. 652, 665, cited 8 Ves. 500.

on the real estate, although so far as it was payable out of the personal estate, the bequest was revoked by a codicil not executed according to the statute. *(f)* An annuity, which was by a will charged originally on real estate, was, in *Beckett v. Harden*, held not to be revoked by a codicil not executed according to the statute; and in the same case it was decided, that the annuity was not revoked by another codicil, which revoked the devise, that by the will was, subject to the annuity, made to J. B., and, in the place of that devise, devised the same estate to J. P. *(g)* A person by his will devised all his lands to A., subject to an annuity, which he bequeathed to his wife; and afterwards by a codicil he devised part of those lands to B. and C., confirming all his devises and bequests in favour of his wife; and she was held to be entitled to resort, for her annuity, to the part devised to B. and C. *(h)*

*SECTION II.

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LIABILITY OF ANNUITANT TO PAY LAND-TAX.

A RENT or annuity devised out of land is liable to pay a proportion of the land-tax payable for the land; *(i)* unless such rent is devised in terms intended to exempt it from that payment; as in the terms, "free of all taxes;" or, "clear of all taxes;" *(j)* or, "without any deduction, or abatement, for any taxes, charges, or impositions, imposed or to be imposed, parliamentary, or otherwise;" *(k)* or, it seems, "without any deduction, defalcation, or abatement for or in any respect whatsoever." *(l)*

If the rent or annuity is devised by the words "clear yearly sum," it seems it must be stated to be doubtful, if those words are sufficiently strong to exempt the annuitant from the payment of the land-tax. *(m)*

There is a distinction between a rent or annuity, and an annuity which is only an instalment of a legacy. For an annuity payable out of land is not liable to pay the land-tax, when it is only a yearly payment or instalment of a sum of money bequeathed out of land, and directed to be paid by certain yearly payments. *(n)*

Where a person devised an annuity to his brother and sister-in-law, charging it on shares in the New River Company, and the annuity had been paid for sixteen years without deducting the land-tax, Lord Hard-

(f) *Sheddon v. Goodrich*, 8 Ves. 481, 487.

(g) 4 M. & S. 1.

(h) *Reeves v. Newenham*, 1 Vern. and Scriv. 319, 482, 2 Ridgew. P. C. 11.

(i) Stat. 38 G. III. c. 5; 38 G. III. c. 60, s. 15; 42 G. III. c. 116, s. 92, 127; *King v. Weston*, 2 Eq. Cas. Abr. 62; *Atwood v. Lamprey*, 3 P. W. 127, 5th ed. 127, n. B.; *Nicholls v. Leeson*, 3 Atk. 573.

(j) *Brewster v. Kitchin*, or *Kitchell*, or *Kidgell*, 1 Ld. Raym. 317, 1 Salk. 198, Cas. T. Holt, 669; *Champernon v. Champernon*, cited Dougl. 603, 4th ed. 625. See *Hodgworth v. Crawley*, 2 Atk. 376.

(k) *Marchioness of Blandford v. Duchess of Marlborough*, 2 Atk. 542, cited 2 Ves. 503, 504.

(l) *Bradbury v. Wright*, Dougl. 602, 4th ed. 624; which seems to overrule *Green v. Marygold*, 8 Vin. Abr. 411, 2 Eq. Cas. Abr. 64.

(m) *Hodgworth v. Crawley*, 2 Atk. 376; *Earl of Tyrconnel v. Duke of Ancaster*, 2 Ves. 499, Amb. 237; *Villa Real v. Lord Galway*, 1 Bro. C. C. 4, n.

(n) *Grimston v. Lord Bruce*, 1 Salk. 156, 2 Vern. 594.

[*135] wicke refused to relieve the prayer against *the mistake; his Lordship saying, "I go upon the reason of other cases, and on this general rule, that where the annuity is given to a relative for life, whether it is expressed for maintenance or not, if it has been paid for any length of years, and no deduction has been made on account of the land-tax, nor was it owing to any fraud or imposition on the receiver, I will presume it has been so paid by the mutual consent of both sides, and if there should arise any quarrel between the prayer and receiver afterwards, the prayer is not entitled to be relieved."(*o*)

SECTION III.

REMEDY TO OBTAIN PAYMENT OF THE ANNUITY.

AN annuity devised, and by the will made payable out of land, is a rent;(*p*) a rent-seck, if the will does not contain a clause of distress on non-payment of it, and a rent-charge, if this clause is contained in the will.(*q*) If it is a rent-charge, and it is not paid, the annuitant has a remedy at common law by distress.(*r*) And if the annuity is a rent-seck, and is not paid, the annuitant has a remedy at law by distress, under the statute 4 Geo. II. c. 28, s. 5.(*s*) And in the case of the rent-seck, it appears also that, before the statute mentioned, the annuitant might obtain relief in equity by a decree for payment of the rent.(*t*) When the devise is of a rent-charge, the devisee may, under the clause of entry, recover possession by ejectment.(*u*) A writ of annuity *is [*136] a remedy at law against the person of the grantor of an annuity.(*v*) It follows that this writ is not a remedy, of which a devisee of an annuity, devised out of land, can avail himself, the grantor having in this case ceased to exist before the gift of the annuity takes effect.(*w*) If an annuity, or yearly rent, is devised to A., and made payable, during the life of B., out of real estate devised to B. for life, it is decided, that during the continuance of A.'s freehold interest, an action of debt does not lie, either at common law, or by the statute 8 Anne, c. 14, s. 4, for the arrears of the annuity.(*x*)

(*o*) *Nicholls v. Leeson*, 3 Atk. 573.

(*p*) *Brediman's case*, or *Brediman v. Bromley*, 6 Co. 56 b., Cro. Jac. 142; *Kingswell v. Cawdrey*, Mo. 592.

(*q*) Litt. S. 217, 218; Co. Litt. 143 b.; *Brediman's case*, 6 Co. 56 b., 58 a.; *Buttery v. Robinson*, 3 Bingh. 521.

(*r*) Litt. S. 217, 218. See *Hassell v. Gouthwaite*, Willes, 509, 508.

(*s*) *Saward v. Anstey*, 2 Bingh. 521, 522; *Buttery v. Robinson*, 3 Bingh. 392, 11 J. B. Moore, 262. See on the sale of the distress, Stat. 2 W. & M. c. 5; 4 G. II. c. 28, s. 5; 11 Geo. II. c. 19; and *Short v. Hubbard*, 2 Bingh. 349, 9 J. B. Moore, 667.

(*t*) *Web v. Web*, Mo. 626; *Ferrers v. Tannet*, or *Tanner*, Cited there, and also in 3 Ch. Cas. 91; *Shute v. Mallory*, Mo. 305; *Ferris v. Newby*, cited 1 Ch. Cas. 147.

(*u*) *Eure v. Eure*, 1 Eq. Cas. Abr. 115; *Morgan v. Morgan*, 2 Dick. 643; *O'Donel v. Browne*, 1 Ball & B. 262. See *Jemot v. Cooley*, T. Raym. 158, 1 Lev. 170.

(*v*) Litt. S. 219; Co. Litt. 144 b.; *Brediman's case*, 6 Co. 58 b.

(*w*) *Brediman's case*, 6 Co. 58 b.; *Gilb. on Rents*, ed. 1792, 120. See also *Saward v. Anstey*, 2 Bingh. 521.

(*x*) *Webb v. Jiggs*, 4 M. & S. 113; *Kelly v. Clubbe*, 3 Brod. & B. 130.

SECTION IV.

REMEDY TO OBTAIN PAYMENT OF AN ANNUITY, CHARGED ON AN INCORPOREAL HEREDITAMENT.

It is a common law prerogative of the king, to reserve a rent out of an incorporeal hereditament leased by him, and to distrain the lessee's corporeal hereditaments, namely, all his lands, if the rent is not paid.(y)

It is said that a subject cannot, by the common law, reserve a rent out of an incorporeal hereditament.(z) This is true, if a service reserved in a lease made by him is not a rent, except he can distrain for it. But it is not true, if the service may be a rent, although a distress for it cannot be made. For it is clear that a subject may, by deed, make a lease for years of tithes, and reserve a service in money, and this lease will be a contract, on which, if the money is not paid, he may maintain an action of debt.(a) A service (apparently in money) reserved in a lease of tithes was, in *Dalston v. Reeve*, decided to be a rent;(b) and this decision is *supported by several other authorities.(c) A rent cannot, [*137] however, by the common law, be reserved to a subject on a lease for life made by him of tithes, or other incorporeal hereditament. Such reservation is void; and the reason seems to be, because, during the lease, there is no remedy to recover the rent: it cannot be distrained for, and, during a freehold lease, an action of debt does not, by the common law, lie for rent reserved in it.(d) By the statute 8 Anne, c. 14, s. 4, an action of debt now lies for rent reserved in a lease for life of corporeal(e) hereditaments. And by the statute 5 Geo. III. c. 17, ecclesiastical persons are authorized to lease tithes, or other incorporeal hereditament, either for life or years, and by an action of debt to recover the rent reserved in the lease. But although a subject may make the leases mentioned of incorporeal hereditaments, and therein reserve a rent, yet a subject cannot distrain for any service or rent reserved in a lease of an incorporeal hereditament.(f) It seems to follow that, when an annuity is by a subject devised out of such an hereditament, as out of tithes, the devisee cannot, if the annuity is not paid, distrain for the annuity. But although he is denied this remedy at law, a Court of Equity will, it appears, afford him relief. And accordingly, in *Thorndike v. Allington*, where a devise was made of 20*l.* per annum out of a rectory, with a clause of distress for non-payment, and the glebe was worth only 40*s.* a year, the Court held that the whole rectory, tithe as well as glebe, was liable to pay the annuity, and the defendant was decreed to pay the arrears.(g)

(y) *Gilb. on Rents*, 22.

(z) *Co. Litt.* 44 b., 47 a., 144 a.; *Gilb. on Rents*, 20—23; *Jewel's case*, 5 *Co.* 3; *Butt's case*, 7 *Co.* 23 b.

(a) *Co. Litt.* 47 a.; *Gilb. on Rents*, 24, 93.

(b) 1 *Ld. Raym.* 77.

(c) *Dean and Chapter of Windsor v. Gover, or Gower*, 2 *Saund.* 302, *T. Raym.* 194, 1 *Lev.* 308; *Tipping v. Grover*, *T. Raym.* 18; *Bally v. Wells*, 3 *Wils.* 25.

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(d) *Co. Litt.* 47 a.; *Gilb. on Rents*, 25, 93; 3 *Bl. Com.* 232; *Hawk. Abr. Co. Litt.* 73.

(e) *Mr. Serjeant Hawkins* makes a question, whether this statute does not extend to leases of incorporeal hereditaments. *Hawk. Abr. Co. Litt.* 73; *Harg. Co. Litt.* 47 a., n. 4.

(f) *Co. Litt.* 47 a., 144 a.; *Gilb. on Rents*, 20, 21.

(g) 1 *Ch. Cas.* 79.

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*SECTION V.

INTEREST ON ARREARS OF AN ANNUITY.

GENERALLY speaking, interest is not payable on the arrears of a rent-charge, or rent-seck, or other annuity; and a Court of Equity has, in several cases, refused to decree such interest: (*h*) in one where the annuity was created by deed; (*i*) in others, where it was a jointure created by deed; (*j*) and in another, where the annuity was by will bequeathed, out of real and personal estate, to the testator's sister. (*k*) Under some circumstances, however, equity will decree interest; (*l*) and in particular cases the Court has made this decree. (*m*) When the annuity is given by will, a circumstance which inclines the Court to allow interest is, that the annuity is the bread, or only source of maintenance, of the annuitant, who is the widow, or an infant child, of the testator. (*n*) Other circumstances that occasion the same inclination are, that the annuity is a rent-charge, and the annuitant, being entitled to enter, either obtains possession of the estate, or beings an ejectment; and the owner of the land applies to a Court of Equity for the purpose, in the one case, to oblige the annuitant to quit the possession, and, in the other, to procure an injunction to stay the legal remedy of ejectment. (*o*) And, [*139] *accordingly, the Court has decreed interest to be paid on an annuity bequeathed to the testator's widow, (*p*) and, in another instance, bequeathed to the testator's infant heir at law; (*q*) and on a rent-charge, to compel the payment of which the annuitant brought an ejectment, and to stay this remedy at law the owner of the land obtained an injunction in equity. (*r*)

SECTION VI.

SALE OF THE ESTATE CHARGED.

WHEN an annuity is devised out of land, it will be a charge on the land in the hands of a purchaser, who bought with notice of the will. (*s*)

(A) *Batten v. Earnley*, 2 P. W. 163; *Big-
nal*, or *Bicknell*, v. *Brereton*, 1 Dick. 378;
Anon., S. C., 2 Ves. 661; *Lindsay v. Anon.*,
cited 1 Ves. jun. 451; *Creuze v. Hunter*, 3
Ves. jun. 157; *Creuze v. Lowth*, S. C., 4
Bro. C. C. 316. See also *Stapleton v. Con-
way*, 1 Ves. 438; *Morris v. Dillingham*, 3
Ves. 170; *Bennifold v. Waring*, cited 3 Bro.
C. C. 495; and *Mellish v. Mellish*, 14 Ves.
516.

(i) *Robinson v. Cumming*, 3 Atk. 409, 411.

(j) *Bedford v. Coke*, 1 Dick. 178, also
stated 2 Ves. jun. 166; *Tew v. Earl of Win-
terton*, 3 Bro. C. C. 489, 493, 1 Ves. jun.
451.

(k) *Anderson v. Dwyer*, 1 Sch. & Lef.
301.

(l) 2 P. W. 163; *Cas. T. Talb.* 2; 2
Ves. 170; 1 Dick. 181.

(m) *Newman v. Auling*, 3 Atk. 579; *Cot-
ton v. White*, 1 Dick. 182, n. See also 1
Ves. 428.

(n) 1 P. W. 543; 2 Atk. 211; 3 Atk. 579.
Yet see *Bedford v. Coke*, 1 Dick. 178, cited
2 Ves. jun. 166, and *Tew v. Earl of Win-
terton*, 3 Bro. C. C. 495, 1 Ves. jun. 451.

(o) *Countess of Ferrers v. Earl Ferrers*,
Cas. T. Talb. 2; *Robinson v. Cumming*, 2
Atk. 411; *Morgan v. Morgan*, 2 Dick. 643.

(p) *Litton v. Litton*, 1 P. W. 541.

(q) *Drapers' Company v. Davis*, 2 Atk.
211.

(r) *Morgan v. Morgan*, 2 Dick. 643;
O'Donel v. Browne, 1 Ball & B. 262.

(s) *Barn. Ch. Rep.* 63.

In *Wynn v. Williams*, a purchaser was, after the death of the annuitant, decreed to pay to her personal representatives several years' arrears of the annuity.^(f) On a devise of land, charged by the will with the payment of an annuity, either a rent-charge, or rent-seck, the annuity is not a charge on the devisee personally; and if he sells the estate, he cannot, after he has so parted with it, be compelled to pay the annuity. But if on the sale he obtains a covenant from the purchaser to pay it, he may support an action on this covenant, although he cannot be damnified on non-payment.^(u) It is stated that in the argument of a case it was held, "that if a man devise an annuity to a child, to be issuing out of certain lands, and by the same will he deviseth the same lands for the payment of his debts and legacies, that the devise of the annuity is a subsisting charge on the lands, and shall be good."^(v)

*SECTION VII.

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CHARGE ON RENEWABLE LEASEHOLDS.

WHEN renewable leaseholds are devised, and the testator charges them with the payment of an annuity, and they are devised in terms, the legal effect of which is to pass the whole of the testator's interest in the lease; and after his death the lease is, under the tenant-right of renewal, renewed by the devisee; the annuity will, after this renewal, continue to be a charge on such leaseholds; unless, from some other part of the will, the intent appears to confine the bequest of the annuity to the lease only, which subsists at the testator's death.^(w) And if the will contains no direction on this farther point, it must, it should seem, be stated to be doubtful, whether the annuitant is obliged to contribute to the renewal fines, in proportion to his interest in the property.^(x)

SECTION VIII.

APPORTIONMENT.

ON the death of the devisee of an annuity for his life, charged on land, his personal representative is entitled to such part of the annuity as became due on the last day on which the annuity was payable; but not to any part or arrears between that day and the death of the annuitant.^(y) If

(f) 5 Ves. 130.

(u) *Saward v. Anstey*, 2 Bingh. 519.

(v) *Powell's Case*, Nels. 302.

(w) *Maxwell v. Ashe*, stated from Reg. B. 7 Ves. 184; *Winslow v. Tighe*, 2 Ball & B. 195; *Stubbs v. Roth*, ib. 548. See *Anon.* 2 Freem. 22, Ca. 21.

(x) *Maxwell v. Ashe*, 1 Bro. C. C. 444,

n.; *Moody v. Matthews*, 7 Ves. 174; *Winslow v. Tighe*, 2 Ball & B. 206; *Stubbs v. Roth*, ib. 554.

(y) *Webb v. Lord Shaftesbury*, 11 Ves. 361; *Anderson v. Dwyer*, 1 Sch. & Lef. 301. See also *Franks v. Noble*, 12 Ves. 484, *Pearly v. Smith*, 3 Atk. 261, and *Howell v. Hanforth*, 2 W. Bl. 1016.

the annuitant dies on a day on which the rent is payable, his personal representative will, it seems, be entitled to such rent up to that day, if he died after sunset; but if he died before sunset, then only up to the last day on which the annuity was payable. (z)

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*SECTION IX.

MISCELLANEOUS POINTS OF THE GENERAL SUBJECT.

A CASE is thus reported—"The will was, 'I devise my lands in the parishes of A. and B. to J. S.; and I devise a rent to J. N., out of my lands in the parish aforesaid;' and per Holt, C. J., good to charge the lands in both parishes." (a)

When an annuity is devised, and by the will made a charge on A., which is freehold land, and also on B., which consists of leaseholds for years, this rent will not be two rents, a freehold out of A., and a chattel out of B.; but the construction which may be put on this devise seems to be, that one rent only is devised, that the whole rent is freehold property, and that, if it is not paid, the annuitant may distrain for it, either on the freehold land, or on the leaseholds for years. (b)

An annuity given by will is, for many purposes considered as a legacy. (c) In *Sibley v. Perry*, where Lord Eldon decided that the annuitant was entitled to a share of the residue bequeathed to legatees, his Lordship stated, "The rule is, that an annuitant will fall under the general character of legatee, unless there is something to show the testator himself distinguished between them. In that I found myself on the case of the Duke of Bolton's will, upon which Lord Thurlow held, that, legacies being charged on real estate, annuities were charged on the real estate as legacies." (d) A person devised all his real and personal estates to S. A., subject to, and chargeable with, a certain annuity to his widow, and appointed S. A. executrix. The testator had no real estate, except a certain tavern; a part of the furniture and effects in which also belonged to him. This property he had insured, and, after his death, the policy expiring, the executrix renewed it. The tavern was afterwards
[*142] burnt down. And in a *suit instituted by the widow against the executrix for the administration of the testator's estate, the sums due on the policy were ordered to be paid into Court; Sir L. Shadwell saying, "I shall not enter into the question whether she [the defendant] was bound to renew the policy of insurance or not. The fact is, that she, being the executrix, did renew it, and therefore I must hold that, *prima facie*, she renewed it in the character in which she was entitled to renew it, namely, as executrix. The inclination of my opinion is, that the proceeds of the policy cannot be considered as part of the testator's general personal estate; but that they are affected with a trust for the benefit of

(z) *Southern v. Bellasis*, 1 P. W. 179, n., cited *ib.* 180, and in *Prec. Ch.* 556.

(a) *Cas. T. Holt*, 298, 12 Mod. 375.

(b) *Butt's case*, 7 Co. 23.

(c) *Attorney General v. Downing*, 1 Dick. 417; *Nannock v. Horton*, 7 Ves. 403; *Sibley v. Perry*, 7 Ves. 534.

(d) 7 Ves. 534.

the parties interested in the real estate. And *prima facie*, there is so much ground for holding that the proceeds of the policy are a substitution for the property charged, that the order ought to be made according to the notice of motion.”(e) In a case where an annuity was payable out of personal estate, and which, from some unknown cause, had for many years been paid out of real estate devised by the testatrix, the Court, on the ground of laches and other circumstances, dismissed a bill which the annuitant had filed for the purpose of having an account of the testatrix’s personal estate, and out of it the arrears of the annuity satisfied, and the future payments of it secured.”(f)

*CHAPTER VIII.

[*143]

OF PROPERTY BY OR IN THE COURTS OF LAW AND OF EQUITY HELD TO BE ASSETS.

- SECT. I. *Of Property by or in a Court of Law held to be Assets.*
 II. *Of Property by or in a Court of Equity held to be Assets.*

SECTION I.

OF PROPERTY BY OR IN A COURT OF LAW HELD TO BE ASSETS.

THERE are many cases, in which property, particularly circumstanced, has by or in a Court of Law been held to be assets.(a)

And in particular it may be mentioned, that by or in a Court of Law, the following kinds of property have been held to be assets; namely,—Money produced by a sale of land devised to executors, on condition to sell to pay debts:(b) a leasehold estate vested *in the executor, and although not sold:(c) a lease for years, although the [*144] rent is the full value of the land:(d) a term of years, which a woman

(c) Parry v. Ashley, 3 Sim. 97.

(f) Brown v. Claxton, 3 Sim. 225.

(a) Anon. 3 Dyer, 264 b., Ca. 41, cited Mo. 858; Boddy v. Hargrave, Mo. 566; Anon. 2 H. VIII., cited 2 Leon. 7; Alexander v. Gresham, 1 Leon. 224; Bethel v. Stanhope, Cro. Eliz. 810, Owen, 132; Anon. Dales, 89, Ca. 4; Cope v. Lewyn, Hob. 38; Bafeld v. Collard, Aleyn, 1; Norden v. Levit, 1 Lev. 189; Dethicke v. Caravan, ib. 224; Peirce v. Davy, Gouldsb. 58; Chandler v. Tomson, 1 Rol. Abr. 921; Legerd v. Linley, Clayt. 38; Topham v. Brown, ib. 123, 11 Vin. Abr. 232; Anon. Savile, 118; Jenkins v. Plume, or Plombe, 1 Salk. 207, 6 Mod. 181; Turner v. Davies, 1 Mod. 62; Cooke v. Colcraft, 2 W. Bl. 858; King v. Thom. 1 Durn. & E. 489, cited 3 East, 110; Webster v. Spencer, 3 Barn. & Ald. 365;

Clark v. Hougham, 2 B. & C. 157; Bushby v. Dixon, 3 B. & C. 298.—27 H. VIII. 6 Bro. Abr. tit. *Assets enter maines*, pl. 1, cited 1 Leon. 112; Bro. Abr. tit. *Propertie*, pl. 50; Gouldsb. 177; 1 Brownl. & G. 34; 2 Brownl. & G. 46, 47; 5 Co. 34; Hob. 59; Keilw. 63 b.; Yelv. 33; 7 Durn. & E. 359. See also Siordet v. Brodie, 3 Campb. 253. See, generally on this subject, 1 Rol. Abr. 920, and Vin. Abr. tit. *Assets*, and tit. *Executors*, G. a., G. a. 2, G. a. 3.

(b) 1 Rol. Abr. 920, G. pl. 2, 3, 6; 1 Brownl. & G. 34; 2 Brownl. & G. 46, 47; 1 Rol. Rep. 56; Shawe v. Huntley, 1 Rol. Abr. 920, 11 Vin. Abr. 226. See also Burwell v. Corrant, Hardr. 405.

(c) Jury v. Woodhouse, 1 Barnes, 240.

(d) Kale v. Jocelyne, Style, 61.

possessed as executrix, and which became extinguished in the reversion purchased by her husband:(e) a lease for years possessed by an executor in this character, and extinguished by his purchase of the reversion:(f) a term of years surrendered by an executor:(g) a reversion for years, expectant on a term of years granted by a testator:(h) a lease for one year made by a copyholder:(i) a lease for years by license made by a copyholder:(j) a lease for years, or a personal chattel, pledged by a testator, and redeemed by his executor:(k) a lease for years by an intestate deposited with a third party, and on which the latter has a lien:(l) money by an executor recovered in the Court of Chancery, and come to his hands:(m) damages recovered by an executor:(n) damages recovered by an executor of an executrix of a lessee, for a breach of covenant entered into by the lessor with the lessee: a lease for years made to an executor of an executrix of a lessee, under a covenant entered into by the lessor with the lessee:(o) a debt owing by an executor to his testator:(p) a debt owing by an administrator to his intestate:(q) the profits of a [*145] testator's goods, traded with by the executor:(r) *goods in Ireland, or in any other country beyond sea:(s) a ship:(t) and which is, perhaps, present assets although out at sea:(u) stock, or money in the public funds:(v) the young of certain animals, of which the testator dies possessed; as lambs, pigs, or calves, which are produced by his sheep, swine, or cows, after his death:(w) a debt which is part of the testator's estate, and which the executor has released:(x) money for which an administratrix sold the good-will of the trade of her intestate, who was a publican, and whose house, where the trade was carried on, the administratrix lived in as tenant at will for some time before she sold the good-will:(y) the advantage of a news-walk.(z)

(e) Anon. Mo. 54, Ca. 157.

(f) Bro. Abr. tit. *Executors*, 174; tit. *Exting.* 54, 57; tit. *Lease*, 63; Fryer v. Gildich, 1 Brownl. & G. 76. See also Mo. 507, and 3 Leon. 112.

(g) 1 Co. 87 b.

(h) Prattle v. King, T. Jones, 169.

(i) Anon. Poph. 188, 11 Vin. Abr. 146.

(j) Anon. Poph. 188.

(k) Bro. Abr. tit. *Admin.* 51, *Assets enter maines*, 12, *Executors*, 179; 1 Leon. 155. See also arg. 4 Ves. 541.

(l) Vincent v. Sharp, 2 Stark, 507.

(m) Harecourt, or Harcock, v. Wrenham, Mo. 558, 1 Brownl. & G. 76; Harwood v. Wraynam, 1 Rol. Abr. 920; Anon. 1 Rol. Rep. 56, Ca. 32.

(n) Co. Litt. 124 a.; 1 Rol. Abr. 920, G. pl. 4; 11 Vin. Abr. 231, pl. 47; Cope v. Lewyn, Hob. 38; Anon. Savile, 118. See also Yard v. Ellard, 1 Salk. 117.

(o) Chapman v. Dalton, Plowd. 286, 292, cited 1 Co. 98 b.

(p) Woodward v. Lord Darcy, Plowd. 186; Holliday v. Boas, 1 Rol. Abr. 920, G. pl. 13; Flud v. Ramsey, Yelv. 160; Dorchester v. Webb, Cro. Car. 373; Wankford v. Wankford, 4 Salk. 299, 306, 3 Salk. 162, 1 Freem. 520, cited 8 Dowl. & Ryl. 64. See also Mo.

507, and Bro. Abr. tit. *Executors*, 114. See likewise the next section of this chapter.

(q) 1 Rol. Abr. 920, G. pl. 11.

(r) 1 Rol. Abr. 920, G. pl. 8.

(s) Dowdale's case, or Richardson v. Dowdale, 6 Co. 46 b., Cro. Jac. 55.

(t) Brady v. Shiel, 1 Campb. 147.

(u) Bank of England v. Morrice, 2 Barn. Rep. 184.

(v) Franklin v. Bank of England, 9 B. & C. 156, 161, 4 Mann. & Ryl. 11. See S. C. in 1 Russ. 575.

(w) Godb. 32.

(x) Brightman v. Keighley, Cro. Eliz. 43; Veghelman v. Kighley, 1 Anders. 138; Kightley v. Kightley, 4 Leon. 102; Kittley's case, Godb. 29; Anon. Dalis. 89, Ca. 4; Anon. Owen, 36.—Hob. 66.

(y) Worrall v. Hand, 1 Peake Rep. 74, 3rd ed. 105. Lord Kenyon, before whom the cause was tried, said, "In the Court of Chancery it was the daily practice to consider all beneficial interests, such as renewable leases, and the like, as assets, and to charge the representative with the money arising from them; and this was analogous to those cases." On the goodwill of a trade, see also Cruttwell v. Lye, 17 Ves. 335, 1 Ross, 123, and Bryson v. Whitehead, 1 Sim. & St. 74.

(z) Anon. cited 2 Bos. & P. N. R. 70.

Sperate debts contained in an inventory, delivered by an executor or administrator to the Ecclesiastical Court, are also by a Court of law held to be assets. (a) In such inventory an executor or administrator is bound to put down, as part of the testator's estate, the debts owing to the deceased. (b) If the inventory admits the debts to be recoverable, they are called sperate (c) debts. And in an action brought against an executor, such inventory is evidence that the debts "may be had for demanding." (d) And, accordingly, debts put down in the inventory, are, by a Court of Law, held to be *primâ facie* assets in the hands of the executor, (e) if he therein admits the debts to be recoverable; (f) [*146] or if, in the inventory, "there is one particular of good and bad debts," and the executor "doth not distinguish them." (g) The effect of the evidence afforded by the inventory is, to charge the executor with the debts contained in it as assets in his hands, and to entitle the plaintiff to a verdict against him. But such evidence may be defeated by proof, on the part of the executor, that the debts, supposed to be sperate, are in fact desperate; and on this proof the executor may obtain a verdict. (h) In an action upon the case against an executor, upon *plene administravit* pleaded, it was declared by Holt, C. J.,—"That all sperate debts mentioned in the inventory shall be counted assets in the executor's hands; for that is as much as to say, that they may be had for demanding, unless the demand or refusal be proved." (i) And according to another report, of perhaps the same case, upon a *plene administravit*, Holt said,—"If an inventory be produced, where there is one particular of good and bad debts, the defendant shall be charged with the whole, because he doth not distinguish them, unless he can discharge any part of it by special evidence." (j) In Buller's *Nisi Prius*, a case is mentioned in these terms,—"If in the inventory produced, the article concerning debts did not distinguish between sperate and desperate, it would be sufficient to charge the executor with the whole *primâ facie* as assets, and put it upon him to prove any of them desperate: as if the article were, 'Item, for debts due and owing, which I admit myself to be charged with when recovered or received.' *Smith v. Davis*, M. 10 Geo. II., per Hardw. J." (k) The same case is also stated in Selwyn's *Nisi Prius*, and here it is said,—"Lord Hardwicke, C. J., put the defendant on proof, that she could not recover those debts; for she ought in her inventory to have set forth which debts were sperate and which desperate. The defendant proved by a witness, who went to demand several of them, that "he could not recover them; and accordingly they were allowed as desperate." (l) [*147] In *assumpsit* against executors to recover the value of certain goods, the defendants, in support of their third plea, *plene administraverunt præter* 367l., proved the inventory given in by them to the Ecclesiastical Court, which

(a) 1 Salk. 296; 1 Stark. Rep. 32.

(b) Stat. 21 H. VIII. c. 5, s. 4; Swinh. 5th ed. 404; 2 Bl. Com. 510.

(c) 1 Salk. 296; 8 Taunt. 735, 736.

(d) 1 Salk. 296.

(e) 1 Salk. 296; Bull. N. P. 140.

(f) 8 Taunt. 736.

(g) Comberb. 342.

(h) *Shelley's case*, 1 Salk. 296, Cas. T. Holt, 305; Anon. Comberb. 342; *Smith v.*

Davis, Bull. N. P. 140, 2 Selw. N. P. 8th ed. 783, n.

(i) *Shelley's case*, above.

(j) Anon. Comberb. 342. In the same page, the reporter of this case adds "Note, sperate debts shall be reckoned as money in pocket, because it is supposed the executor may have them when he will."

(k) Bull. N. P. 140.

(l) 2 Selw. N. P. 8th ed. 783, n.

admitted the sum of 367*l.* to be due to the testator's estate, but stated that 232*l.*, the amount of certain debts, supposed to be recoverable, was included in that sum. The plaintiff obtained a verdict for 367*l.*; and this verdict, it was decided, the plaintiff was entitled to retain, Dallas, C. J., saying,—“The defendants have, in their inventory, admitted the debts to be recoverable, and do not now deny that they are recoverable. But this case is still stronger against the defendants, for the plaintiff has produced an affidavit, stating that the debts might be recovered, if applied for.”(m) A case may here be mentioned, in which an action of debt was brought against an executor on a bond, and he having written a letter to the plaintiff, stating the particulars of the testator's estate, and therein mentioned 300*l.* as due on a mortgage to the testator, upon producing this letter at the trial, the judge took it as sufficient evidence to prove, that the 300*l.* came to the defendant's hands, and directed the jury accordingly. But against the judgment obtained in this action, a Court of Equity relieved the defendant, on proof, by the executor, that the mortgage was a bad security, there being three precedent mortgages on the same lands, and that the 300*l.* had not been received, but was still standing out upon such subsequent mortgage.(n) It remains to notice a *Nisi Prius* case, in which it appears an inventory, that contained certain debts due to an intestate, was not considered to be *prima facie*, or sufficient evidence of assets in the hands of the administrator; a case which is, therefore, it would seem, at variance with the authorities before mentioned. It occurred, it is observable, before the decision in *Young v. Cawdrey*. In *Giles v. Dyson*, an administrator, the defendant had exhibited an inventory in the Ecclesiastical Court; and the [*148] Counsel for the plaintiff contended, *that certain debts which the defendant, in his inventory, allowed to be due to the estate, and which he did not represent to be desperate, were to be considered as actual assets in the defendant's hands; but he admitted it was competent to the defendant to show, that these debts had not been paid. Lord Ellenborough, —“You must prove, presumptively at least, that these debts have been paid; that presumption may depend on the time, and a number of other circumstances; but upon the plea of *plene administravit*, it is necessary to prove that effects came into the hands of the defendant; this is the universal practice.”(o)

(m) *Young v. Cawdrey*, 8 Taunt. 734;
Young v. Cordery, S. C., 3 J. B. Moore, 66.

(n) *Robinson v. Bell*, 2 Vern. 146.
 (o) 1 Stark. 32.

SECTION II.

OF PROPERTY BY OR IN A COURT OF EQUITY HELD TO BE ASSETS. (p)

THERE are many cases in which property, particularly circumstanced, has by or in a Court of Equity been held to be assets. (*q*)

And, in particular, it may be mentioned, that by or in a Court of Equity, the following kinds of property have been held to be assets; namely,—money arising from the sale of land, devised to be sold by executors for payment of the testator's debts: (r) stock, or money in the public funds: (s) money due to a testator on mortgage: (t) the equity of redemption of a term of years *mortgaged: (u) the equity of redemption of the fee-simple mortgaged: (v) the trust of a lease for years: (w) [*149] money by a will appointed under a general power to appoint for any purpose: (x) the power being reserved by the testator himself, on a settlement made by him, (y) or being given to the testator, (z) or being to charge land, either of himself, or of another person: (a) money by a voluntary deed appointed under a general power to charge land by deed or will for any purpose: (b) a chattel interest by a voluntary deed appointed in land, by a person then indebted, and who had a general power to appoint for

(p) On the subject of this section, see also the chapter on Equitable Assets.

(g) *Kingdon v. Bridges*, 2 Vern. 67; *Ashfield v. Ashfield*, ib. 287; *Chichester v. Blackstaff*, ib. 295; *Tooke's case*, cited ib. 54; *Rider v. Wager*, 2 P. W. 332; *Watts v. Thomas*, ib. 364; *Bligh v. Earl of Darnley*, ib. 622; *Dunn v. Green*, 3 P. W. 9; *Gibson v. Sanders*, Sel. Ca. Ch. 18, 11 Vin. Abr. 235; *Anon.* 2 Freem. 100; *Ryall v. Ryall*, 1 Atk. 59; *Frederick v. Aynscombe*, ib. 392; *Cook v. Duckenfield*, 2 Atk. 566; *Lawton v. Lawton*, 3 Atk. 13; *Mabank v. Metcalf*, ib. 95; *Byrn v. Godfrey*, 4 Ves. 6.

(r) **Burwell v. Corrant**, Hardr. 405.

(s) **Franklin v. Bank of England**, 1 Russ. 575, 585, 597. See S. C. in 9 B. & C. 156, and 4 Mann. & Ryl. 11. Late cases, it may here be noticed, on stock passing under particular words used in a will, are *Collier v. Squire*, 3 Russ. 467, and *Kendall v. Kendall*, 4 Russ. 360.

(i) *Bridgman v. Tyrer*, *Cas. T. Finch*, 236; *Corsellis v. Corsellis*, *ib.* 351; *Casborne v. Scarfe*, 1 Atk. 605.

(u) *Barthrop v. West*, 2 Ch. Rep. 63; *Coleman v. Winch*, 1 P. W. 776; *Case of Creditors of Sir C. Cox*, 3 P. W. 341; *Hartwell v. Chitters*, Amb. 308; *Clarke v. Samson*, 1 Ves. 100. See also *Fosset v. Austin*, Prec. Ch. 39.

(v) *Plucknet v. Kirk*, 1 Vern. 411; *Solley v. Gower*, 2 Vern. 61; *Anon.* 2 Freem. 115; *Plunket v. Penson*, 2 Atk. 294. See also *Trevor v. Perryor*, 1 Ch. Cas. 148, and *Ryall v. Ryall*, 1 Atk. 59.

(w) Attorney General v. Sands, 3 Ch. Rep. 37, Nels. 134, 2 Freem. 131. See King v. Ballett, 2 Vern. 248, and Scott v. Scholey, 8 East, 486. On the liability of an attendant term to be assets, see 3 Ch. Rep. 37; Nels. Rep. 134; 2 Freem. 131; 2 Ch. Cas. 152; Prec. Ch. 247; 11 Mod. 5; Tiffen v. Tiffen, 1 Vern. 1, 2 Ch. Cas. 49, 52, 2 Freem. 66; Chapman v. Bond, 1 Vern. 188; Thrxuton v. Attorney General, ib. 340; Baden, or Bladen, v. Earl of Pembroke, 2 Vern. 52, 53, Nels. 164; Earl of Pembroke v. Bowden, 8, C. 3 Ch. Rep. 217; Charlton v. Low, 3 P. W. 328. See also Dowse v. Percival, 1 Vern. 104.

(x) *Lord Townshend v. Windham*, 2 Ves. 9; and *Shirley v. Lord Ferrers*, there cited. See *Grise v. Goodwin*, 2 Freem. 264, 265; *Harrington v. Harte*, 1 Cox, 181; *Holmes v. Coghill*, 7 Ves. 499, 12 Ves. 206; and *Buckland v. Barton*, 2 Hen. Bl. 136.

(y) *Thompson v. Towne*, Prec. Ch. 52, 2 Vern. 319; *Lassells v. Lord Cornwallis*, Prec. Ch. 232, 2 Vern. 465, 2 Freem. 279; *Ashfield v. Ashfield*, 2 Vern. 287; *George v. Milbanke*, 9 Ves. 190.

(z) *Hinton v. Toye*, 1 Atk. 465; *Bainton v. Ward*, 2 Atk. 172, and from Reg. B. 7 Ves. 503, n.

(a) *Lassells v. Lord Cornwallis*, *Shirley v. Lord Ferrers*, *Bainton v. Ward*, and *George v. Milbanke*, above.

(b) *Pack v. Bathurst*, 3 Atk. 269. See also *Troughton v. Troughton*, 3 Atk. 656, 1 Ves. 86; and *Lord Townshend v. Windham*, 2 Ves. 9.

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any purpose:(c) leases bequeathed, and, by the assent of the executor, vested in the legatee:(d) shares in a newspaper, and of the profits of printing it subsequent to the death of the owner of the shares,(e) a debt [*150] which an executor owes to his testator.(f) On the last kind of *assets it may be mentioned, that if a bond or simple contract debt is owing by A. to B., who appoints A. his executor, at law the debt is by this means extinct, in the sense, that the action is gone; but at law the debt is still assets;(g) and the debt is not extinct in equity,(h) where it is part of the testator's personal estate,(i) and is assets to pay debts,(j) and legacies,(k) and may itself be by the testator bequeathed,(l) and will pass in a bequest of the residue.(m) Also, where the residue was undisposed of, the executor has been held to be a trustee of the debt for the testator's next of kin.(n) And, farther, the testator's heir at law is entitled to have mortgaged lands exonerated out of a debt owing by the executor.(o)

[*151]

*CHAPTER IX.

OF PERSONAL AND REAL ASSETS.

OF assets there are assets *per descent*, and assets *enter maines* of an executor.(a) Assets *enter maines*, or in the hands, of an executor, appear to be called also *personal* assets;(b) and to be applicable to pay simple contract debts, and also debts of a higher degree, as by bond or covenant, which binds the testator's heir at law, and by statute, judgment, or recognizance.(c) Assets *per descent* appear to be called also

(c) Lord Townshend v. Windham, 2 Ves. 1.

(d) Chamberlain v. Chamberlain, 1 Ch. Cas. 256, cited 3 East, 125, 127.

(e) Gibblett v. Read, 9 Mod. 459. See also Cooke v. Colcraft, 2 W. Bl. 856.

(f) Askwith v. Chamberlain, 1 Ch. Rep. 138, Toth. tit. Debt, p. 53; Nichols v. Chamberlain, 3 Ch. Rep. 89; Brown v. Selwin, Cas. T. Talb. 240, 241; Simmons v. Gutteridge, 13 Ves. 262.

(g) Woodward v. Lord Darcy, Plowd. 186; Holliday v. Boas, 1 Rol. Abr. 920; Wankford v. Wankford, 1 Salk. 306, Cas. T. Holt, 311; Cheetham v. Ward, 1 Bos. & P. 630; Freakley v. Fox, 9 B. & C. 130, 4 Mann. & Ryl. 18.—Bro. Abr. tit. Dette, 65, Executors, 114, 118; Mo. 507; 1 Brownl. & G. 62. See also Fryer v. Gildring, Mo. 855, and Caweth v. Philips, 1 Ld. Raym. 605.

(h) Field v. Clerk, 1 Ch. Rep. 242; Anon. 2 Freem. 52, Ca. 58. See Mathew v. Fitz-Simon, 4 Bro. P. C. ed. Toml. 11.

(i) Askwith v. Chamberlaine, Toth. tit. Debt, p. 53; Errington v. Evans, 2 Dick. 456.

(j) Brown v. Selwin, Cas. T. Talb. 240, 241; Freakley v. Fox, 9 B. & C. 134.

(k) Nichols v. Chamberlain, 3 Ch. Rep. 89, Nels. 44; Brown v. Selwin, Cas. T. Talb. 242.

(l) Cas. T. Talb. 242.

(m) Phillips v. Phillips, 1 Ch. Cas. 292, 2 Freem. 11; Brown v. Selwin, Cas. T. Talb. 240; both cited 1 West Cas. T. Hardw. 163.

(n) Carey v. Goodings, or Goodwyn, 3 Bro. C. C. 110; Berry v. Usher, 11 Ves. 87, 90.

(o) Fox v. Fox, 1 West Cas. T. Hardw. 162, 2 Eq. Cas. Abr. 502, 1 Atk. 463.

(a) Termes de la Ley, v. Assets; 2 Bl. Com. 244, 510.

(b) 2 Bl. Com. 340; 2 Ves. jun. 70.

(c) 2 Bl. Com. 511.

Bury & taken 11 Dec 87 & R 39.

Real assets;(d) and at the common law, and except under the doctrine of marshalling assets, and the case of Crown debts, not to be applicable to pay simple contract debts, but only debts of a higher degree, as by bond or covenant, which binds the testator's heir at law, and by statute, judgment, or recognizance.(e)

These different kinds of assets may form the subjects of,

SECTION I. *Of Personal Assets.*

II. *Of Real Assets.*

SECTION I.

OF PERSONAL ASSETS.

THE following kinds of property are *personal assets*,(f)—an estate *pur auter vie* in freehold(g) land, and limited to the testator merely, or to him, his executors and administrators:(h) a rent-charge *pur auter vie*, and limited to the grantee merely, *without naming his heirs, [*152] executors, or administrators:(i) an estate *pur auter vie* by a lease limited to A. and his heirs, and in a settlement made by A. converted into personal estate, and afterwards devised by him:(j) the right of the next presentation to a church, which is full, and which right has been granted to a person, who dies possessed of it:(k) timber growing on the estate of a lunatic, and cut under an order of the Court of Chancery, founded on the master's report, that it would be for the benefit of the lunatic, and sold, the produce of the sale being paid into the Bank on account of the lunatic:(l) damages recovered by an executor in an action of trespass:(m) all personal property, which devolves to executors, and is assets.(n)

(d) 2 Bl. Com. 340; 3 Ves. jun. 70.

(e) See the Statutes, 47 G. III. c. 74, and 1 W. IV. c. 47; and Butl. Co. Litt. 191 a, n., vi. 9.

(f) See also Chapter XI., on Property held to be personal estate of a person deceased.

(g) Neither sect. 12 of Stat. 29 C. II. c. 3, nor sect. 9 of Stat. 14 G. II. c. 20, extends to Copyholds; Zouch v. Forde, 7 East, 186.

(h) Stat. 29 C. II. c. 3, s. 12; 14 G. II. c. 20, s. 9; Duke of Devonshire v. Atkins, 2 P. W. 381, Sel. Ca. Ch. 71; Oldham v. Pickering, 2 Salk. 464, 1 Ld. Raym. 96; Ripley v. Waterworth, 7 Ves. 425, 441, 447.

See Raggett v. Clarke, 1 Vern. 234, 2 Ventr. 364.

(i) Bearpark v. Hutchinson, 7 Bingh. 178.

(j) Duke of Devonshire v. Kinton, or Atkins, 2 Vern. 719, 2 P. W. 381, cited 7 Ves. 444.

(k) 7 B. & C. 150, 151, 183, 193; Bro. Abr. tit. Chattels, pl. 20, tit. Estates, pl. 51.

(l) Ex parte Bromfield, 1 Ves. jun. 453; Oxenden v. Lord Compton, 8 C., 2 Ves. jun. 69.

(m) Co. Litt. 124 a.

(n) 6 Co. 47 b.; Savile, 119; 1 Russ. 585, 597; 2 Bl. Com. 510. Of a testator's personal property out of England, see Dowdale's case, 6 Co. 46 b.

SECTION II.

OF REAL ASSETS.

THE following kinds of property, descended from a person seised in fee, are *Real* assets,—freehold land:(*o*) ancient demesne land:(*p*) gavel-kind land:(*q*) Borough English land:(*r*) land descended from an ancestor, between whom and the heir there is an intermediate descent:(*s*) lands descended on the part of the father and of the mother:(*t*) a trust estate [*153] in fee-simple:(*u*) *tithes in the hands of laymen:(*v*) advowson in fee in fee appendant to a manor:(*w*) advowson in fee in gross:(*x*) which, whether the descent is of a trust estate,(*y*) or the legal estate,(*z*) a Court of Equity will decree to be sold, for the payment of judgment and specialty debts.(*a*)

An estate *pur auter vie*, limited to the ancestor and his heirs, is likewise real assets.(*b*)

A reversion in fee descended is, when assets, real assets, and offers several distinctions.

The Courts of Law and of Equity hold to be assets, a reversion in

(*o*) Anon. 2 Dyer, 124 a., Ca. 38; Emerson v. Inchbird, 1 Ld. Raym. 728; Wilson v. Armorer, 1 Lev. 287, 3 Salk. 157, 1 Rol. Abr. 269, A. pl. 3. Of lands in Ireland or Scotland, see Evans and Ascough's case, Latch, 234, cited arg. 1 Vern. 419, and Bligh v. Earl of Darnley, 2 P. W. 622.

(*p*) Fitzh. Abr. tit. *Assets per disc.* 1; Bro. Abr. tit. *Assets per disc.* 11; 1 Rol. Abr. 269, A. pl. 1; 3 Vin. Abr. 141.

(*q*) Co. Litt. 376 b.; Hob. 25; Cro. Jac. 218; W. Jo. 88; Hawtrise v. Auger, or Anger, 2 Dyer, 239 a., Mo. 74.

(*r*) Jo. 88; 14 Vin. Abr. 245.

(*s*) Anon. 3 Dyer, 368 a., Ca. 46; Denrye's case, Noy, 56, 14 Vin. Abr. 245; Bowyer v. Rivitt, W. Jo. 88, 14 Vin. Abr. 245; Jenks' case, Cro. Car. 151; Holley v. Weeden, 2 Ch. Cas. 175, 1 Vern. 400.

(*t*) Co. Litt. 376 b.; 2 Co. 25 b.; 3 Co. 14 a.; Hob. 25; W. Jo. 88; 14 Vin. Abr. 245.

(*u*) Stat. 29 C. II. c. 3, s. 10; 2 Freem. 115; King v. Ballett, 2 Vern. 248. See Creed v. Colville, 1 Vern. 172, Lady Grey v. Colville, 2 Ch. Rep. 143, and Goffe v. Whalley, 1 Vern. 282.

(*v*) Co. Litt. 159 a.

(*w*) 3 Atk. 465.

(*x*) At law, this advowson seems to be assets to make a lineal warranty a bar in formedon; Bro. Abr. tit. *Assets per disc.* 4, 21; Co. Litt. 374 b., cited 3 Atk. 461, 464; but, at law, it is perhaps not assets to pay debts.

Vocat. & St. Dial. 2, ch. 26, ed. 1709, p. Cro. Eliz. 359; Savile, 119; 2 Atk. Atk. 461, 464; Jacob, 221; 7 B.

and C. 150. It is clear that an advowson may be extended, in the sense, be valued; Fleta, lib. ii., c. 71, s. 10, p. 158, ed. 1685; Britton, 185, 186, ed. 1640; Cro. Eliz. 359, 360; Co. Litt. 374 b., where the passages in Fleta and Britton are cited by Sir E. Coke, as authorities, that an advowson is "valuable," and to support his opinion that an advowson is assets to make a lineal warranty a bar in formedon. But neither Fleta nor Britton says that an advowson is assets; and Sir E. Coke does not say that it is assets to pay debts. In Anon. Savile, 119, it is said, "Each thing which the law gives to the executors shall be said to be valuable, and, consequently, shall be assets. By recovery in *Quare impedit*, they shall recover damages, which shall be assets. And as an advowson shall be assets in the heir, so a presentation shall be in the executors." On the right of an executor, or heir, or other party, in certain cases to present to a church, see Bro. Abr. tit. *Chattels*, 6, 20; 11 Vin. Abr. 145, pl. 16; Shep. Touchat. 432; Holt v. Bishop of Winchester, 3 Lev. 46, 3 Salk. 280, and Rennell v. Bishop of Lincoln, 3 Bingh. 223, 7 B. & C. 113, 9 Dowl. & Ry. 810.

(*y*) Robinson v. Tonge, 3 Vin. Abr. 145, 2 Eq. Cas. Abr. 509, 1 Bro. P. C. ed. Toml. 114, 3 P. W. 398, 401, cited 2 Atk. 206, and 3 Atk. 464.

(*z*) Westfaling v. Westfaling, 3 Atk. 460, 461, 464, cited 7 Ves. 447.

(*a*) Jacob Rep. 221.

(*b*) Stat. 29 C. II. c. 3, s. 12; Marwood v. Turner, 3 P. W. 163, 166; Westfaling v. Westfaling, 3 Atk. 460.

fee expectant on a term of years;(c) and also a reversion *in fee expectant on an estate for life.(d) And, in the last instance, a Court of Equity will, during the estate for life, decree the reversion, descended to the heir at law, to be sold, for the payment of the ancestor's specialty debts.(e) [*154]

At law, if a person seised of a reversion in fee, expectant on an estate-tail, enters into a bond wherein he binds his heirs, this reversion descended from the obligor to his heir is, before it is fallen into possession, so far not assets, that the heir may plead *riens per descent*.(f) But, after it is fallen into possession, it may be assets.(g) And if a reversion in fee, expectant on an estate for life and contingent uses in tail, descends to the heir of the donor, in equity it is, before it is fallen into possession, the donor's assets, which the Court will decree to be sold for the payment of his specialty debts. And it is probable also the same decree may be obtained, in the stronger case of a reversion in fee expectant on an estate-tail, or entail which is vested.(h)

On a reversion being assets at law, Sir T. Plumer has made the following observations:—"There are three cases of reversions. If it be a reversion dependant upon a term of years, the law does not consider the term as any thing; and judgment is given against the heir, if he plead *riens per descent*. But if the creditor takes out an *elegit*, he is stopped by the term, which is a good defence for the lessee in ejectment, and so there is a *cesset executio* during the term. If it be a reversion after an estate for life, the heir must plead specially, stating that he has no assets, *except this, and setting forth what it is: the creditor may then take judgment *quando acciderit*. In the case of [*155] a reversion after an estate-tail, the authorities say that the heir may plead generally *riens per descent*; distinguishing this from the plea in the case of a reversion after an estate for life. The plaintiff may then reply that there is this reversion descended to the defendant, and he may then have a judgment *quando acciderit*, the same as in the case of a reversion after an estate for life."(i)

The law of inheritance offers a distinction between a fee-simple in possession, and a fee-simple in reversion expectant on an estate-tail. And with reference to the descent of the former fee, or fee in possession, there is an important difference between a seisin *in law* and *actual* seisin. If A. is seised in fee of land, of which no other person is seised or

(c) *Smith v. Angell*, 2 Ld. Raym. 783, 7 Mod. 40, 1 Salk. 364; *Villers v. Handley*, 2 Wils. 49; *Tyndale v. Warre, Jacob*, 217, 218; *Bushby v. Dixon*, 3 B. & C. 298, 5 Dowl. & Ry. 126. See also *Osbaston, or Osbaston, v. Stanhope*, 2 Mod. 50, 3 Salk. 180, 1 Freem. 160.

(d) *Rook v. Clealand*, 1 Ld. Raym. 53, 1 Lutw. 503, 507; *Smith v. Angell*, 2 Ld. Raym. 784, 785, 786, 7 Mod. 42.—*Jacob Rep.* 216, 218. Rent reserved on a lease for life, and as incident to the reversion descended to the heir of the lessor, seems to be assets on voucher of the heir. Bro. Abr. tit. *Assets per desc.* 17, 23.

(e) *Tyndale v. Warre, Jacob*, 212, 221, 222. See *Fortrey v. Fortrey*, 2 Vern. 134.

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(f) *Terling v. Trafford*, cited 6 Co. 42 a., 58 b., and *Jacob Rep.* 216, 1 Rol. Abr. 269, A. pl. 2; *Kellow v. Rowden*, 3 Mod. 257; *Round v. Kello, S. C.*, 1 Freem. 498; *Kinaston v. Clark*, 2 Atk. 206; *Smith v. Parker*, 2 W. Bl. 1232; *Tyndale v. Warre, Jacob*, 217.

(g) *Kellow v. Rowden*, 3 Mod. 253, 1 Freem. 498; *Godolphin v. Abingdon*, 3 Atk. 57; *Kinaston v. Clark*, ib. 204, and stated from MS., 2 Cruise Dig. 2d ed. 447; *Countess of Warwick v. Edwards*, 1 Dick. 51; *Tyndale v. Warre, Jacob*, 218. See also *Marchioness of Tweeddale v. Earl of Coventry*, 1 Bro. C. C. 240.

(h) *Tyndale v. Warre, Jacob*, 212.

(i) *Jacob Rep.* 217, 218.

possessed; or if A. is seised in fee of land, of which no other person is seised, and of which another person is in possession for a term of years, for an uncertain chattel estate, or at will; A. is seised in fee-simple in possession. If the land, of which no other person is seised or possessed, descends from A. to B., the heir at law, then, immediately on the death of A., B. is seised *in law* only; and, after B. has entered on the land, he is *actually* seised of it. If the land, of which no other person is seised, and of which another person is in possession for a term of years, or for an uncertain chattel estate, descends from A. to B., the heir at law, then, immediately on the death of A., B. is *actually* seised of the land.(j) This difference between the two seisins is of much importance; because, if the heir dies seised in law only, the ancestor, from whom the descent came to him, continues to be the stock of descent; but if the heir dies actually seised, then he himself is the stock of the next descent, agreeable to the maxims, *seisina facit stipitem*, and *possessio fratris de feodo simplici facit sororem esse hæredem*.(k) In each of the mentioned cases, where the heir dies actually seised, he dies actually seised in fee-simple in possession; and because he is so seised, he himself is the [*156] *stock of descent. And in a case where a reversion in fee, expectant on the estate of a tenant from year to year, descended to A., who, without receipt of rent, died seised, a Court of Law held that, by reason of the possession of the tenant from year to year, A. died actually seised, and that the land was assets to satisfy a bond debt of A.(l) When the fee-simple, which descends to the heir, is not a fee in possession, but a fee in reversion expectant on an estate-tail, then if he, who is seised in tail, is either another person or the heir himself, such heir is not, during the continuance of the entail, actually seised in fee-simple in possession;(m) and it follows that, when the reversion falls into possession, he himself cannot, on the ground that while the entail continued he was actually seised in fee-simple in possession, be the stock of descent. But he may be the stock of descent for other reasons. For if he is seised of the freehold, the law allows the heir in fee in reversion expectant on the entail to make, by certain acts done by him, an alteration or change in the freehold and the reversion, and by this means to make himself the stock of descent.(n) But if the heir has not so changed the freehold and reversion, or at least the reversion, he will not be the stock of descent.(o) That stock may be the donor of the entail.(p) And a consequence is, that if, when the reversion falls into possession, and is then claimed by descent, the heir, who took by descent the reversion, is not the stock, from whom the present heir must make title to the land, such land will not be assets of that intervening heir of the re-

(j) Litt. S. 8; Co. Litt. 15 a., 29 a.; Bushby v. Dixon, 3 B. & C. 298.

(k) Litt. S. 8; Co. Litt. 14 b., 15 a., 15 b., 29 a.; 2 Bl. Com. 209, 227; Bro. Abr. tit. *Discent*, 30; Goodtitle v. Newman, 3 Wils. 516; Doe v. Keen, 7 Durn. & E. 386.

(l) Bushby v. Dixon, 3 B. & C. 298, 5 Dowl. & Ryl. 126.

(m) Co. Litt. 14 b., 29 a.

(n) Stringer v. New, 9 Mod. 363.

(o) Bro. Abr. tit. *Discent*, 30; Co. Litt. 14 b.; 1 Rol. Abr. 628, pl. 6, 7, 8, 9; 3 Mod. 257; Cunningham v. Moody, 1 Ves. 174; Doe v. Hutton, 3 Bos. & P. 643.

(p) Kellow v. Rowden, 3 Mod. 253; Giffard v. Barber, 4 Vin. Abr. 452, 2 Eq. Cas. Abr. 706; Jenkins v. Prichard, 2 Wils. 45, by mistake said to be adjudged for the defendants, 3 Bos. & P. 658. See a correct report of the same case in Watk. on Desc. 113, n., 3d ed., 144, n.

version, but will be the assets of him, who is found to be the present stock of descent.(g)

*It remains to notice, that as the intervening heir or reversioner expectant on the estate tail may grant the reversion, [*157] so he may incumber it by a charge or judgment.(r) And notwithstanding a judgment will not make such intervening heir the stock of descent, it binds the reversion; and although the reversion, when it falls into possession, will not, to satisfy that judgment, be assets descended to the heir of him who is the stock of descent, as the donor of the estate-tail, yet such heir takes the reversion bound by the judgment, which accordingly is available against him.(s)

*CHAPTER X.

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OF PARAPHERNALIA; OF A WIFE'S PERSONAL CHATTELS, MADE BY MARRIAGE THE PROPERTY OF HER HUSBAND; AND OF PERSONAL CHATTELS, WHICH ARE THE SEPARATE PROPERTY OF A WIFE.

SECT. I. *Of Paraphernalia.*

II. *Of a Wife's personal Chattels, made by Marriage the Property of her Husband.*

III. *Of personal Chattels, which are the separate Property of a Wife.*

SECTION I.

OF PARAPHERNALIA.

THERE are certain personal chattels, which, in a husband's life-time, are, to most intents, his own property; but which, after his death, belong, except as against his creditors, to his widow. These are called her paraphernalia; which is a term borrowed from the Civil Law, and, derived from the Greek language, signifies something over and above her dower.(a) The apparel and ornaments of the person of the wife are

(g) *Kellow v. Rowden*, 3 Mod. 253, 3 Lev. 286, 1 Show. 244, Carth. 126, Cas. T. Holt. 71, 336; *Round v. Kello*, 8. C., 1 Freem. 498; *Giffard v. Barber*, 4 Vin. Abr. 452, 2 Eq. Cas. Abr. 706; which authorities contradict *Smith v. Parker*, 2 W. Bl. 1230, a case also denied to be law by Lord Thurlow, Lord Alvanley, and Sir T. Plumer, 1 Bro. C. C. 246, 3 Bos. & P. 650, Jacob, 219.

(r) 3 Mod. 256; 4 Vin. Abr. 452; 1 Ves. 177; 2 W. Bl. Rep. 1232.

(s) *Giffard v. Barber*, 4 Vin. Abr. 452, Ca. 17. Eq. Ca. Abr. 706.

(a) 2 Bl. Com. 436. See also on the word Paraphernalia, *Fleta*, lib. v. c. 23, s. 6, Mo. 213, and 1 Rol. Abr. 911.

paraphernalia;(b) namely, convenient(c) apparel and ornaments, or, adopting expressions, which appear to be intended to convey the same meaning, apparel and ornaments "convenient for her degree,"(d) or "having regard unto her degree,"(e) or "suitable to her rank and degree."(f) *In one case, however, the degree of the wife, [*159] with reference to her title to paraphernalia, seems to be made to depend on the degree of her husband.(g) And in a case where Gould, J., expressed an opinion, that the husband was bound to support his wife in a manner suitable to his degree, he observed, "the law takes notice of things suitable to the degree of the husband, in the paraphernalia of the wife."(h) According to other authorities, the suitability of paraphernalia appears to be considered as depending on the quality of the wife and her husband.(i)

From different cases which have occurred in the Courts, it appears that paraphernalia have consisted of, or may consist of, rings;(j) trinkets;(k) a gold watch;(l) jewels;(m) jewels of the value of 3000*l.* at least;(n) diamonds;(o) a diamond necklace;(p) "four chains of gold, twenty-eight dozen of gold buttons, and an agate (agget);"(q) "sixty-five great pearls, and sixty-five small pearls, and a diamond chain."(r)

Although it is commonly said that paraphernalia are the apparel and ornaments of the wife's person,(s) yet it is not clear they may not also consist of other kinds of personal chattels,(t) as of a bed,(u) or dressing or chamber plate.(v)

To make jewels, or other personal ornaments, paraphernalia, [*160] it seems to be necessary, that the wife have in her husband's life-time not only possessed, but worn, the particular jewels or ornaments. For most of the authorities speak of these paraphernalia as having been, during the marriage, worn or used by the wife.(w) Where a diamond necklace was claimed as paraphernalia, Lord Hardwicke appears to have considered that, to support this claim, it was essential it should be proved, that the lady had worn it as the ornament of her person: but said it is not necessary to prove she wore it at all times, "but only upon

(b) 2 Bl. Com. 436.

(c) 33 H. VI. 31; Bro. Abr. tit. *Administrators*, pl. 6; tit. *Executors*, pl. 19; Fitzh. Abr. tit. *Executors*, pl. 24; 1 Rol. Abr. 911, pl. 6, 8; Mo. 214.

(d) Cro. Car. 344. See 2 Dyer, 166 b.

(e) 2 Leon. 166.

(f) 2 Bl. Com. 436.

(g) Viscountess Bindon's case, 2 Leon. 166. See also Offley v. Offley, Prec. Ch. 27.

(h) Jenkins v. Tucker, 1 Hen. Bl. 94.

(i) 1 Rol. Abr. 911, pl. 2; Lord Hastings v. Douglas, or Douglass, 1 Rol. Abr. 911, pl. 9, Cro. Car. 343. See also Mo. 216.

(j) 2 Atk. 104; 3 Atk. 434; Stanway v. Styles, 2 Eq. Cas. Abr. 156, in marg.

(k) 2 Atk. 104.

(l) Stanway v. Styles, above; Seymour v. Treilian, 3 Atk. 358; Seymour v. Trevilian, S. C., 1 West Cas. T. Hardw. 109.

(m) 1 Ch. Cas. 240; 1 Freem. 304; 1 P. W. 729; 2 Atk. 104; 3 Atk. 358; 2 Ves. 4; 1 Bro. C. C. 576.

(n) Northey v. Northey, 2 Atk. 77, 79.

(o) 3 Atk. 434. See Calmady v. Calmady, 11 Vin. Abr. 181, 2 Eq. Cas. Abr. 628, Ca. 9.

(p) Graham v. Lord Londonderry, 3 Atk. 393.

(q) Viscountess Bindon's case, Mo. 213, 2 Leon. 166.

(r) Lord Hastings v. Sir A. Douglass, Cro. Car. 343, W. Jones, 332, 1 Rol. Abr. 911, pl. 9.

(s) 2 P. W. 79; 2 Bl. Com. 436.

(t) 1 Rol. Abr. 911, pl. 2; Noy's Max. Ch. 49; 2 Ch. Rep. 382.

(u) 1 Rol. Abr. 911, pl. 2; 11 Vin. Abr. 178, 180, pl. 13; Noy's Max. Ch. 49; 2 Ch. Rep. 382.

(v) Middleton v. Middleton, 3 Ch. Rep. 377, 382; Ridout v. Earl of Plymouth, 2 Atk. 104; Incedon v. Northcote, 3 Atk. 434; Offley v. Offley, Prec. Ch. 27.

(w) 1 Rol. Abr. 911, pl. 9; Cro. Car. 344; 3 Atk. 359; 1 West Cas. T. Hardw. 110; 2 Bl. Com. 436.

birth-days and other public occasions, which it has been proved she did."(*x*) And in a case where it appeared the husband kept certain jewels under lock and key, and that his executor found them locked up in his bureau at the time of his death, Lord Hardwicke held them to be paraphernalia, notwithstanding they had been kept by the husband: his Lordship saying, "the being in the custody of the husband will make no alteration, for the possession of the husband is the possession of the wife, and so vice versa, as she wore them for the ornament of her person whenever she was drest."(*y*) A case that occurred in the reign of Elizabeth, is thus reported:—"If the husband delivers to his wife a piece of cloth (drape) to make a garment, and dies; although this was not made into a garment in the life-time of the husband, yet the wife shall have it, and not the executor of the husband, inasmuch as it was delivered to her to this intent."(*z*) On the necessity, therefore, of having worn paraphernalia, there may possibly be a distinction between apparel and jewels, or other personal ornaments.

During marriage, paraphernalia are, to most intents, the property of the husband;(*a*) the wife has no power to dispose of them;(*b*) and her husband is entitled to pledge, sell, or give them away.(*c*) During the same period, also, paraphernalia are *liable to the payment [*161] of the husband's debts.(*d*) If he survives his wife, they continue to be his property.(*e*) But if he dies in the life-time of his wife, although he may by his will bequeath them to her,(*f*) yet it is settled he cannot bequeath them away from her,(*g*) a point that formerly was considered to be doubtful.(*h*) When paraphernalia are bequeathed by a husband to his wife, she may elect to take them in her own right, or under the will.(*i*) But if she elects to take them in her own right, a Court of Equity holds her to be obliged to relinquish whatever else she claims under the will, for she must abide by the will *in toto*, or not at all.(*j*)

After the death of a husband, his widow is entitled to "convenient" apparel, but, at law, not to "excessive" apparel. The excess belongs to the husband's executors.(*k*) And at law, an excess of jewels, or other

(*x*) *Graham v. Lord Londonderry*, 3 Atk. 393. *Calmady*, 11 Vin. Abr. 181, 2 Eq. Cas. Abr. 628, Ca. 9.

(*y*) *Northey v. Northey*, 2 Atk. 77.

(*z*) *Harwell v. Harwell*, 1 Rol. Abr. 911.

(*a*) 2 *Kenyon Rep.* pt. 2, p. 7.

(*b*) *Cro. Car.* 344.

(*c*) 2 Atk. 644; 3 Atk. 359, 394; 2 *Kenyon*, pt. 2, p. 7; 2 *Bl. Com.* 436; *Graham v. Lord Londonderry*, 3 Atk. 393.

(*d*) 2 *Kenyon Rep.* pt. 2, p. 7.

(*e*) *Gore v. Knight*, 2 Vern. 3rd ed. 534, & n. (2.)

(*f*) *Burton v. Pierpoint*, 3 P. W. 78; *Clarges v. Duchess of Albemarle*, 2 Vern. 245; *Sir T. Clarges' case*, S. C., Nels. 174; *Churchill v. Small*, 2 *Kenyon*, pt. 2, p. 6. See also *Read v. Snell*, 2 Atk. 642, 644, and *Cary v. Appleton*, 1 Ch. Cas. 240.

(*g*) *Northey v. Northey*, 2 Atk. 77; *Seymour v. Tresilian*, 3 Atk. 358; *Seymour v. Trevilyan*, S. C., 1 West Cas. T. Hardw. 109. See also 1 P. W. 730; 1 Atk. 441, 442; 2 *Kenyon*, pt. 2, p. 7; and *Calmady* v.

Calhady, 11 Vin. Abr. 181, 2 Eq. Cas. Abr. 628, Ca. 9. (*h*) *Lord Hastings v. Douglass*, Cro. Car. 343, W. Jones, 332, 1 Rol. Abr. 911; *Clarges v. Duchess of Albemarle*, 2 Vern. 245; *Wilcox v. Gore*, 11 Vin. Abr. 180, 2 Eq. Cas. Abr. 626. See also *Davenport v. Robinson*, Toth. tit. *Devise*, p. 79.

(*i*) See *Clarges v. Duchess of Albemarle*, 2 Vern. 245, Nels. 174, and *Marshall v. Blew*, 2 Atk. 217.

(*j*) *Churchill v. Small*, 2 *Kenyon*, pt. 2, p. 6; *Meyer v. Gowland*, 2 Dick. 563. "It is a general rule of equity, where the demands are of the same kind of estate, that you cannot claim under, and yet controvert the testator's intention. But I give no opinion where they are different." By Lord Hardwicke, in *Seymour v. Trevilyan*, 1 West Cas. T. Hardw. 109.

(*k*) 33 H. VI. 31; *Fitzh. Abr. tit. Executors*, pl. 24; Bro. Abr. tit. *Administrators*, pl. 6, tit. *Executors*, pl. 19; 1 Rol.

personal ornaments, seems also to belong to them. (*l*) In a Court of Equity it may, however, be different. For in a case where a widow brought a bill against the executor of her husband, to have her paraphernalia, and Lord Hardwicke decreed for the wife, according to the prayer [*162] of the *bill, his Lordship is reported to have said,—“ Though the jewels here are worth 3000*l*. at least, yet the value makes no alteration in this Court.” (*m*)

In a case where, after the death of a husband, a diamond necklace, which was the wife's paraphernalia, was sold, Lord Hardwicke decided she was entitled to an account according to the value at which it had been sold. (*n*) And in the same case, his Lordship expressed an opinion, “ If a husband pledges the wife's paraphernalia, and dies, leaving a sufficient estate to redeem the pledge, and pay all his debts, she shall be entitled to have it redeemed out of the husband's personal estate.” (*o*)

After a husband's death, his creditors cannot take in satisfaction of their debts his widow's necessary (*p*) apparel. (*q*) But, with this exception, a widow's paraphernalia are, at law (*r*) and in equity, assets for the payment of her husband's debts, (*s*) as by recognizance, (*t*) specialty, (*u*) or simple contract. (*v*) But paraphernalia, at least such as are not excessive, are not assets for the payment of legacies. (*w*)

But there may be no paraphernalia, at least to which the widow is entitled, and consequently the apparel and jewels, or *other [*163] ornaments of her person, may be assets for general purposes in the administration of the husband's estate, and therefore be assets for the payment of legacies, if by marriage articles, or a settlement made previously to the marriage, a jointure is settled upon her in terms, which express this provision to be a bar to her claim to paraphernalia; as if it is expressed to be in lieu of dower, and all demands out of the husband's personal estate; (*x*) or to be in bar and satisfaction of the wife's dower and thirds, and all other parts of the real and personal estate of the husband, which she might claim by the common law of England, the custom of London, or otherwise howsoever. (*y*)

Abr. 911, pl. 7; 11 Vin. Abr. 179, pl. 6, 7; Mo. 214, 215. See also 2 Dyer, 166, b.

(*l*) Viscountess Bindon's case, 2 Leon. 166, Mo. 213; Lord Hastings v. Douglass, Cro. Car. 343, 1 Rol. Abr. 911, pl. 9.

(*m*) Northey v. Northey, 2 Atk. 77, 79.

(*n*) Graham v. Lord Londonderry, 3 Atk. 393.

(*o*) Ibid. 395.

(*p*) The word “ necessary ” is, it must be confessed, rather an indefinite expression. And no authority has been met with, where it is explained to mean necessary, according to the “ rank and degree ” of the wife. Lord Hardwicke stated in a case before him, As to paraphernalia, “ the rule of law is, that where the husband dies indebted, the wife is not entitled thereto. In Cr. C. there is a case, that the wife was entitled only to one gown.” 2 Ves. 7. In Lord Hastings v. Douglass, a Court of Law agreed, that a husband could not by his will give his wife's necessary apparel away from her, because she ought not to go naked, but be preserved from shame and cold. 1 Rol. Abr. 911, pl. 9.

(*q*) Noy's Max. Ch. 49; 2 Bl. Com. 436; 2 Ves. 7; 1 Rol. Abr. 911, pl. 5.

(*r*) Viscountess Bindon's case, Mo. 213, 216; Harwell v. Harwell, 1 Rol. Abr. 911; Lord Hastings v. Douglass, Cro. Car. 343; Lord Townshend v. Windham, 2 Ves. 7.

(*s*) Shipton v. Hampson, Cas. T. Finch, 145; Lady Tyrrel's case, S. C., 1 Freem. 304; Stubbs v. Stubbs, Cas. T. Finch, 415; Willson v. Pack, Prec. Ch. 295; Burton v. Pierpoint, 2 P. W. 78; Nicholas v. Southwell, Mo. 177; Ridout v. Earl of Plymouth, 2 Atk. 104; Lord Townshend v. Windham, 2 Ves. 1, 7; Churchill v. Small, 2 Kenyon, pt. 2, p. 7. See also Campion v. Cotton, 17 Ves. 263.

(*t*) Tynt v. Tynt, 2 P. W. 542.

(*u*) Tipping v. Tipping, 1 P. W. 729; Snelson v. Corbet, 3 Atk. 369.

(*v*) Willson v. Pack, Prec. Ch. 295; Snelson v. Corbet, 3 Atk. 369.

(*w*) Tipping v. Tipping, 1 P. W. 730, cited 3 Atk. 395; Snelson v. Corbet, 3 Atk. 369, 370.

(*x*) Chomley v. Chomley, 2 Vern. 47, 82, Nels. 179.

(*y*) Read v. Snell, 2 Atk. 642, 644.

SECTION II.

OF A WIFE'S PERSONAL CHATTELS, MADE BY MARRIAGE THE PROPERTY OF HER HUSBAND.

MARRIAGE makes the property of the husband, and his personal representatives, all the chattels personal, as "ready money, jewels, household goods, and the like,"(z) which, in the wife's own right,(a) either belong to her at the time of the marriage,(b) or come to her during the coverture,(c) and which, in either case, are not paraphernalia, and are in possession,(d) or, as it is expressed, "capable of immediate and tangible possession,"(e) and are not settled to her separate use. And the marriage makes this absolute gift, "whether the husband survive the wife, or no."(f) But if such chattels personal are, by [*164] a third party, settled or given to the separate use of the wife, then they are not the property of the husband, but belong to the wife, independently of him.(g) And if they are paraphernalia, then, as it has been seen, they are not, to all intents, the husband's property.(h)

A Court of Equity has held to be assets of a husband deceased, 100*l.* which the wife had during the coverture deposited with a third party, a relation of the wife, to be kept and secured for her separate use; and 500*l.*, which, during the coverture, and without the husband's privity, the same person gave to the wife, and secured by a promissory note to her.(i) A Court of Equity has also held to be assets of a husband deceased, certain personal chattels, namely, "Jewels, rings, pictures, dressing plate, and other trinkets," given to his wife before marriage, and which upon the marriage the coverture made the property of the husband; and certain personal chattels, namely, "mourning rings, family pictures, &c.," given to the wife after marriage, and which the coverture made the property of the husband:(j) also several jewels, some of which his wife had before marriage, and others which she, during the coverture, bought with money that she had saved out of a yearly sum, that her husband allowed her for her own expense.(k)

(z) 2 Bl. Com. 435.

(a) Co. Litt. 351 b. "Of personal goods, *en autre droit*, as executrix or administratrix, &c., the marriage is no gift of them to the husband, although he survive his wife." (Ibid.) "But they shall go to the administrator *de bonis non*; for should they go to the husband, the creditors, legatees, &c., of the deceased would be thereby wronged." (Note to Co. Litt. 351 b., 11th edition.) In *Thrustout v. Coppin*, 2 W. Bl. 801, 3 Wils. 277, it was decided a husband might release a term of years, which his wife possessed, as administratrix of her former husband.

(b) Co. Litt. 351 b.; Doct. & St. Dial. 1, Ch. 7, ed. 1709, p. 25; Plowd. 418; 1 P. W. 380; 3 Ves. 469; 2 Bl. Com. 433, 435.

(c) Doct. & St. Dial. 1, Ch. 7; *Palmer v. Trevor*, 1 Vern. 281; *Lady Cromwell's case*,

Hob. 3, in marg.; *Pilkington v. Cuthberston*, 2 Bro. P. C. ed. Toml. 7.

(d) Co. Litt. 351 b.; 3 Durnf. & E. 631; 1 Dick. 342; 2 Bl. Com. 435.

(e) 3 Ves. 469.

(f) Co. Litt. 351 b.

(g) *Kirk v. Paulin*, 7 Vin. Abr. 95, Ca. 43, 2 Eq. Cas. Abr. 115; *Petta, or Potta, v. Lee*, 4 Vin. Abr. 131, 2 Eq. Cas. Abr. 149, Ca. 6.

(h) *Northey v. Northey*, 2 Atk. 77; *Seymore v. Tresilian*, 3 Atk. 368. See Section I. of the present Chapter.

(i) *Hodges v. Beverley*, Bunb. 188, cited 2 Madd. Rep. 136, 140.

(j) *Ridout v. Earl of Plymouth*, 2 Atk. 104.

(k) *Lady Tyrrell's case*, 1 Freem. 304; *Shipton v. Hampson*, S. C., Cas. T. Finch, 145.

SECTION III.

OF PERSONAL CHATTELS, WHICH ARE THE SEPARATE PROPERTY OF A WIFE.

A GIFT of personal chattels may be made to a wife's separate use; as in the instances where, during the marriage or coverture, the husband [*165] gave to her money;(l) a bracelet;(m) South Sea *Annuities;(n) trinkets;(o) money saved "out of housekeeping;"(p) the profit of all "butter, eggs, poultry, pigs, fruit, and other trivial matters," arising from a certain farm belonging to the husband, and "over and besides what was used in the family;"(q) as also in the instances where a present, made to the wife on her marriage, was made to her by her husband's father, of diamonds;(r) and where a gift to the wife, during the marriage, was made by the husband's father, of certain pieces of plate;(s) and by a friend, of a picture set about with diamonds.(t)

When on the marriage, or during the coverture, a present is by any person, except the husband, made to the wife, it would seem that, generally speaking, a Court of Equity interprets the gift to be made to the wife's separate use; if such present consists of diamonds, or other ornaments of her person.(u) And this interpretation has been made, where a gift during the coverture consisted of a picture set about with diamonds.(v)

At law, a husband cannot, without the intervention of a trustee, make, during the coverture, a gift to his wife for her separate use, and to take effect in his life-time.(w) But in a Court of Equity such gifts are supported, although not made to a trustee for the wife.(x) Yet a gift of personal chattels from a husband to his wife, during the coverture, is not by a Court of Equity construed to be for her separate use, in other words, to make them her separate estate,(y) except in cases,(z) where there is "a clear irrevocable gift, either to some person as a trustee, or [*166] by some *clear and distinct act of the husband, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife;"(a) or, in nearly the same

(l) Flay v. Flay, 2 Freem. 64; Earl of Shaftesbury v. Countess of Shaftesbury, 2 Vern. 747; Bains v. Ballat, cited in Stanway v. Styles, 2 Eq. Cas. Abr. 156, in marg.; Calmady v. Calmady, cited 3 P. W. 339, and 2 Eq. Cas. Abr. 156, in marg.

(m) Flay v. Flay, 2 Freem. 64.

(n) Lucas v. Lucas, 1 Atk. 270, 1 West Cas. T. Hardw. 456, cited 3 Atk. 393, and 2 Swanst. 106.

(o) Countess Cowper's case, cited 1 Atk. 271, and 3 Atk. 393.

(p) Mangey v. Hungerford, cited in Stanway v. Styles, 2 Eq. Cas. Abr. 156, in marg.; probably Mrs. Hungerford's case, cited 1 Atk. 271, and 3 Atk. 393.

(q) Slanning v. Style, 3 P. W. 334.

(r) Graham v. Lord Londonderry, 3 Atk. 393.

(s) Brinkman v. Brinkman, cited 3 Atk. 394.

(t) Graham v. Lord Londonderry, above.

(u) Ibid.

(v) Ibid.

(w) Litt. S. 168; Co. Litt. 112 a.; 2 Vern. 385; 1 Atk. 271; 3 Atk. 72; 2 Swanst. 106.

(x) 1 Atk. 271; 3 Atk. 394; 2 Swanst. 105, 106.

(y) Lady Tyrrell's case, 1 Freem. 304; M'Lean v. Longlands, 5 Ves. 71; Walter v. Hodge, 2 Swanst. 92. See Izod v. Lamb, 1 Crompt. & Jerv. 44, 45.

(z) Slanning v. Style, 3 P. W. 334; Lucas v. Lucas, 1 Atk. 270, 1 West Cas. T. Hardw. 456, cited 2 Swanst. 106; Countess Cowper's case, cited 1 Atk. 271, and 3 Atk. 393.

(a) 5 Ves. 79, cited 2 Swanst. 104, 106.

words, where there is "a clear distinct act of the husband, by which he divested himself of the property, and agreed to hold it as a trustee for his wife;"(b) or, to the like effect, where there is "satisfactory evidence of an act constituting a transfer of the property, and sufficient transmutation of possession."(c)

Lord Hardwicke has held, that where a husband "expressly gives any thing to his wife, to be worn as ornaments of her person only, they are to be considered merely as paraphernalia; and it would be of bad consequence to consider them otherwise; for if they were looked upon as a gift to her separate use, she might dispose of them absolutely, which would be contrary to his intention."(d)

When a married woman possesses property to her separate use, the rents, interest, or dividends, or other yearly produce of it,(e) her savings out of it,(f) and personal or real property bought by her with either fund,(g) are likewise her separate estate.

A wife's separate estate, made so by the gift of any person, except her husband, is, in a Court of Equity, not assets for the payment of the husband's debts;(h) such gift being of either real(i) or personal(j) estate, and made either before the marriage,(k) *or during the coverture.(l) And a wife's pin-money, made her separate estate [*167] by the gift of her husband, by means of articles, or a settlement, executed previously to the marriage, and her savings out of it, and property, as jewels, bought by the wife with such pin-money, or separate estate, are not assets to pay the debts of the husband.(m) But if a husband during the coverture makes a gift to his wife of personal chattels, as of money, or some ornament of her person, as a bracelet; these, although given to the wife's separate use, are assets for the payment of the husband's debts.(n)

(b) 2 Swanst. 107.

(c) Ibid.

(d) *Graham v. Lord Londonderry*, 3 Atk. 304.

(e) *Gore v. Knight*, 2 Vern. 535, Prec. Ch. 255; *Gold v. Rutland*, 1 Eq. Cas. Abr. 316, Ca. 18; *Eastly v. Eastly*, 2 Eq. Cas. Abr. 148; *Fettiplace v. Gorges*, 1 Ves. jun. 49, 3 Bro. C. C. 8.

(f) *Bletsow v. Sawyer*, 1 Vern. 244; *Slanning v. Style*, 3 P. W. 334, 338; *Stanway v. Styles*, 8. C., 2 Eq. Cas. Abr. 156, in marg.; *Gold v. Rutland*, 1 Eq. Cas. Abr. 346; *Herbert v. Herbert*, *ibid.* 66, Ca. 3, Prec. Ch. 44, and *Sir Paul Neal's case*, there cited; *Hearle v. Greenbank*, 3 Atk. 695, 709; *Fettiplace v. Gorges*, 1 Ves. jun. 49, 3 Bro. C. C. 8.

(g) *Gore v. Knight*, 2 Vern. 3d ed. 535, & n. (2), Prec. Ch. 255; *Fowles v. Countess of Dorset*, 4 Vin. Abr. 131, Ca. 5, 2 Eq. Cas.

Abr. 149, in marg.; *Gold v. Rutland*, *Herbert v. Herbert*, and *Neal's case*, above; *Eastly v. Eastly*, 2 Eq. Cas. Abr. 148; *Offley v. Offley*, Prec. Ch. 27; *Willson v. Pack*, *ib.* 295, 297; *Peacock v. Monk*, 2 Ves. 190.

(h) *Vandenanker v. Desbrough*, 2 Vern. 96; *Herbert v. Herbert*, and *Neal's case*, above. See also 5 Ves. 521.

(i) *Bennet v. Davis*, 2 P. W. 316; *Vandenanker v. Desbrough*, above.

(j) *Kirk v. Paulin*, 7 Vin. Abr. 95, pl. 43, 2 Eq. Cas. Abr. 115.

(k) See *Ex parte Ray*, 1 Madd. Rep. 199.

(l) *Kirk v. Paulin*, and *Bennet v. Davis*, above.

(m) *Herbert v. Herbert*, *Neal's case*, and *Willson v. Pack*, above. See also *Eastly v. Eastly*, above; and 1 Crompt. & Jerr. 43.

(n) *Flay v. Flay*, 2 Freem. 64; *Slanning v. Style*, 3 P. W. 334, 339.

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*CHAPTER XI.

OF A RENT-CHARGE OF A WIFE; OF HER TERMS OF YEARS; AND
OF HER CHOSSES IN ACTION.SECT. I. *Of a Rent-charge of a Wife.*II. *Of her Terms of Years.*III. *Of her Choses in Action.*

SECTION I.

OF A RENT-CHARGE OF A WIFE.

A RENT-CHARGE payable out of real estate is an incorporeal hereditament. It is property which may be inherited, or descend to the heir of the owner.(a) If the rent is granted for life, in tail, or in fee, it is freehold property, and the grantee is seised of it.(b) Yet the hereditament itself must be distinguished from the produce of it. For the produce, or rent become due or in arrear, is a chattel, and is not freehold property.(c) It appears to be called a chattel real;(d) and to be a chattel real in action.(e) If a woman seised of a rent-charge for life, in tail, or in fee, and payable out of real estate, marries, her husband and she are seised of the rent, namely the hereditament, in her right. During the coverture, the husband is entitled to receive the rent, that is, the produce; but the hereditament itself he alone cannot dispose of, but like other freehold estate of the wife, it will survive *to her, in case of her husband's death in her life-time.(f) If the wife dies leaving the rent in arrear, become due both before and during the coverture; to the arrears due before the marriage, the surviving husband is entitled, not by the common law, but under the statute 32 Henry VIII. c. 37, s. 3;(g) and to the arrears become due during the coverture, the husband is by the common law entitled by survivorship, and without, it should seem, taking out letters of administration to his wife.(h) But if the husband dies in the life-time of the wife, and leaving any part of the rent in arrear, unreduced into his possession, the wife is entitled to it by survivorship, and not the personal representative of the husband.(i) Of a rent-charge, the property of a wife, Sir Edward Coke speaks in the following terms.—Having immediately before mentioned estates for

(a) Co. Litt. 6 a. 20 a.; 2 Bl. Com. 20, 41, 42; Gilb. on Rents, ed. 1792, p. 94, 95.

(b) Co. Litt. 162 b., 351 a.; 2 Atk. 514; Gilb. on Rents, 94, 98.

(c) Co. Litt. 162 b., 351 a.; Gilb. on Rents, 98; Salwey v. Salwey, Amb. 692, 2 Dick. 434.

(d) Co. Litt. 351 a.; Amb. 693.

(e) Co. Litt. 251 a. & b.; 2 Dick. 435; Amb. 693.

(f) 2 Atk. 514.

(g) On the application of this Statute to Copyholds, see Gilb. Ten. 187, 188.

(h) Co. Litt. 162 b., 351 a. & b.; 2 Bl. Com. 434, 435; Sharp v. Pool, cited 4 Co. 51.

(i) Co. Litt. 351 a.; Salwey v. Salwey, Amb. 692, 2 Dick. 434. See also Browne v. Dunnery, Hob. 208; Temple v. Temple, Cro. Eliz. 791; and Withers v. Kelasa, 1 Ch. Cas. 189.

years, by statute-merchant, statute-staple, elegit, wardships, and other "chattels real in possession," he proceeds: "Chattels real, consisting merely in action, the husband shall not have by the intermarriage, unless he recovereth them in the life of the wife, albeit he survive the wife; as a writ of right of ward, a *valore maritagii*, a forfeiture of marriage, and the like, whereunto the wife was entitled before the marriage. But chattels real being of a mixed nature, viz. partly in possession, and partly in action, which happen during the coverture, the husband shall have by the intermarriage, if he survive his wife, albeit he reduceth them not into possession in her life-time; but if the wife surviveth him, she shall have them. As if the husband be seised of a rent-service, charge, or seck, in the right of his wife, the rent become due during the coverture, the wife dieth, the husband shall have the arerages; but if the wife survive the husband, she shall have them, and not the executors of the husband. But if the arerages had become due before the marriage, there they were merely in action before the marriage; *and therefore the husband should not have them by the common law, [*170] although he survived her. But now, by the statute 32 Henry VIII. c. 37, if the husband survive the wife, he shall have the arerages as well incurred before the marriage as after. (j)

SECTION II.

OF THE TERMS OF YEARS OF A WIFE.

1. *Of a Legal Estate in Possession.*—2. *Of an Equitable Estate in Possession.*—3. *Of a Possibility, under an Executory Devise.*

1. A TERM of years, the legal estate in possession of which a married woman is possessed of, either at the time of her marriage, or during the coverture, becomes, by the marriage, (k) to many purposes, the property of her husband. He is entitled, during the coverture, to sell, (l) mortgage, (m) or surrender (n) it, and also to dispose of it without a valuable consideration, as by a voluntary settlement of it. (o) He may likewise grant leases out of it; (p) and even a lease made in his life-time, to com-

(j) Co. Litt. 351 a. & b.

(k) Sir W. Grant, speaking of a lease for years, the property of a woman at the time of her marriage, says, "Her husband could derive no other interest in her right than she had. The lease and right of renewal could pass to him only in the same plight and condition as she held them; and therefore subject to every equity, that would attach upon her. The husband, taking by marital right, is not esteemed a purchaser for valuable consideration. He stands precisely in the place of his wife. That is laid down in *Fitzgerald v. Lord Fauconberg*, Fitz-Gib. 207 [2 Eq. Cas. Abr. 677, Ca. 3]." 7 Ves. 184.

(l) Co. Litt. 46 b., 351 a.; 2 Bl. C. 434. In *Anon.* 9 Mod. 43, husband and wife being

divorced *a mensa et thoro*, the Court of Chancery granted an injunction to restrain the husband from selling a term of years, which he possessed in her right.

(m) Co. Litt. 46 b., 351 a.; 2 Bl. C. 434; *Yong v. Radford*, Hob. 3; *Watts v. Thomas*, 2 P. W. 364.

(n) Co. Litt. 46 b., 351 a.; 2 Bl. C. 434.

(o) *Ibid.*; 9 Ves. 98.

(p) Co. Litt. 46 b., 351 a.; *Sym's case*, Cro. Eliz. 33; *Steed v. Cragh*, 9 Mod. 42, cited 6 Ves. 395; *Druce v. Denison*, 6 Ves. 385, 394; which two last cases see on an agreement by the husband to lease, he dying before the lease made. And farther on a lease by the husband, see *Loftus' case*, Cro. Eliz. 279.

mence at his death, will, it appears, be valid. (g) Such a term of the wife [*171] *is, moreover, subject to the payment of her husband's debts, by means of a judgment against him, and execution; (r) and, in case of his bankruptcy, it belongs to the assignees. (s) The husband is also, it should seem, entitled to dispose of the term, by a reference to arbitration, and an award thereon. (t) If he is outlawed, or is convicted of some offence, and such outlawry or conviction will occasion the forfeiture to the Crown of his own terms of years, the term of his wife will be forfeited also; (u) and if he commits suicide, the wife's term will, with his own goods and chattels, be forfeited to the Crown. (v) Notwithstanding a husband may, alone, and without his wife, dispose of her term of years in her life-time, in the ways mentioned, yet, during the coverture, the husband and wife are both possessed of the term, in the right of the wife; (w) and this possession of the wife is the reason, that the husband cannot, unless he survives his wife, dispose of the term by his will; for when the wife's possession continues to his death, it is not permitted to be divested by an act, which does not take effect until afterwards. (x) Also, the wife's interest in the term, in case she survives her husband, is not, it appears, bound by a judgment alone against the husband, where he dies before execution against him. (y) And if the husband charges the term, as by the grant of a rent-charge out of it, this charge will not bind the wife surviving. (z) If the husband survives his wife, the term then becomes his own property; (a) and he takes it as a surviving joint-tenant, without taking out letters of *administration [*172] to his wife. (b) If the husband dies in the life-time of the wife, then the whole term, if not disposed of in his life-time, or so much of it as is not then disposed of, survives to the wife, and does not belong to the personal representatives of the husband. (c)

2. When a married woman is, either at the time of her marriage, or during the coverture, possessed of an equitable estate of a term of years in gross (d) in possession, the legal estate being in a trustee, and such equitable estate not being on her marriage, or during the coverture, settled to her separate use, (e) her husband is entitled to sell or mortgage

(g) *Grute v. Locroft*, Cro. Eliz. 287, cited 1 Co. 155, Mo. 395, and 1 Rol. Abr. 344, G. 13. I. 2; Co. Litt. 351 a.; Plowd. 418. See also Litt. S. 286.

(r) Co. Litt. 351 a.; 2 Bl. C. 434; 1 P. W. 258. That a mortgage term of the wife may be sold to pay the husband's debts, see *Packer v. Wyndham*, Prec. Ch. 412. See also 2 Atk. 208.

(s) 1 Cooke Bk. L. 291, and 8th ed. 325; Eden Bk. L. 2d ed. 245.

(t) Anon. 2 Dyer, 183 a., Ca. 57, & n. in marg.

(u) Co. Litt. 351 a.; 2 Bl. C. 434; 3 Bl. C. 284; 4 Bl. C. 387.

(v) *Hales v. Petit*, Plowd. 257, cited 9 Co. 129 b., and 1 Hale P. C. 413.

(w) Plowd. 418.

(x) Plowd. 418; Co. Litt. 351 a.; 2 Bl. C. 434; 1 Rol. Abr. 344, G. 4.

(y) 1 Rol. Abr. 346, I. 4; 1 Prest. Abstr. 343.

(z) Fitzh. Abr. tit. Charge, 1; Bro. Abr. tit. Charge, 41; 1 Rol. Abr. 344, G. 5, 346,

(a) Co. Litt. 46 b., 351 a.; 2 Bl. C. 434; Yong v. Radford, Hob. 3; Moody v. Matthews, 7 Ves. 174, 183, 184; which case see, on a renewable lease, charged by the wife before marriage with an annuity.

(b) *Wrotesley v. Adams*, 1 Rol. Abr. 345, H. 8; *Pale v. Michell*, 2 Eq. Cas. Abr. 138; *Barwell v. Russell*, Gilb. Eq. Rep. 233. 2 Eq. Cas. Abr. 138;—Plowd. Quær. Qu. 265; 2 Bl. C. 435. See *Doe v. Polgrean*, 1 Hen. Bl. 535.

(c) Co. Litt. 46 b., 351 a.; 2 Bl. C. 434; Sym's case, Cro. Eliz. 33.

(d) On the trust of a term, which attends the inheritance of the wife, see *Best v. Stamford*, 2 Freem. 288, Prec. Ch. 252, 1 Salik. 154.

(e) *Doyle v. Perfull*, or *Persall*, 1 Ch. Cas. 225, 2 Freem. 138; Anon. March Rep. 88, Ca. 141; *Bates v. Dandy*, 2 Atk. 208.—1 Ch. Cas. 266, 1 Vern. 7.

such equitable estate, and to grant leases of the land.(f) And if he survives his wife, the trust becomes, it should seem, in equity, his own property, as survivor, and without taking out administration to the wife.(g) But, at law, it appears the administrator of the wife is entitled to the trust.(h)

3. When a married woman, at the time of her marriage, or during the coverture, is, by means of an executory devise, possessed of a vested legal interest or possibility in a term of years, the term being limited to her expectant on the determination of a preceding devise for life of the term, the husband cannot at law, even for a valuable consideration, assign this term of the wife, while the devise to her is still executory, the term not being yet *fallen into possession.(i) But it is a distinction, that, although he cannot at law assign such a term of [*173] the wife, he may, both at law and in equity, release it, as to the preceding tenant for life of the term.(j) The interest of the wife in a term so devised to her, by an executory devise expectant on a preceding limitation of the term for life, is technically called a possibility; because the first devisee is for his life possessed of the whole term; and as, in contemplation of law, a life estate is of greater importance than a term of years, however long, so it is presumed that the devisee for life will outlive the number of years, small or great, of the term; which presumption makes it possible only that the interest bequeathed over will ever fall into possession, and during the life of the first devisee, therefore, the executory devisee is possessed of a possibility only.(k) It is clear, that a possibility of a term of years, where such possibility is possessed by an executory devisee, in his own right, is, in equity, devisable,(l) and also, for a valuable consideration, assignable by deed.(m) With respect to an assignment by a husband of a possibility possessed in the right of his wife, Lord Hardwicke has said, "A husband cannot assign in law a possibility of the wife, nor a possibility of his own, but this Court [of Chancery] will, notwithstanding, support such an assignment for a valuable consideration."(n) The same learned judge also, on another occasion, stated, that, in equity, "the husband may assign the wife's chose in action, or a possibility that the wife is entitled to, as well as her term, so that it be

(f) *Bullock v. Knight*, 1 Ch. Cas. 265; *Sir Edward Turner's case*, 1 Vern. 7, cited 3 Atk. 214, and reversing the decree in *Turner v. Bromfield*, 1 Ch. Cas. 307; *Pitt v. Hunt*, 1 Vern. 18, 2 Ch. Cas. 73, 2 Freem. 78; *Tudor v. Samyne*, 2 Vern. 270, cited 2 Atk. 421; *Sanders v. Page*, 3 Ch. Rep. 223; *Packer v. Wyndham*, Prec. Ch. 412; *Roupe v. Atkinson*, Bunb. 162; *Bates v. Dandy*, 2 Atk. 208; *Inledon v. Northcote*, 3 Atk. 430, 435. See also *Lady Cromwell's case*, Hob. 3, in marg.
(g) *Pale v. Michell*, 2 Eq. Cas. Abr. 138, Ca. 4.

(h) *Witham's case*, 4 Inst. 87, Co. Litt. 351 a.; *Hunt v. Baker*, 2 Freem. 62. See also *Clerk v. Rutland*, Lane, 113, and *Denie's case*, there cited.

(i) *Carter's case*, cited 4 Co. 66 b., and 10 Co. 47 b., 48 a.; *Lampet's case*, 10 Co. 46

b., 47 b., 6th question; *Thomas v. Freeman*, 2 Vern. 563. See also 1 P. W. 574.

(j) *Lampet's case*, 10 Co. 46 b., 48 a., 48 b.; *Lampit v. Starkey*, S. C., 2 Brownl. & G. 173; *Thomas v. Freeman*, 2 Vern. 563. See also 1 Russ. Rep. 50.

(k) 4 Co. 66 b.; 10 Co. 47 b.; 1 P. W. 574; 9 Mod. 102; Co. Litt. 351 a.

(l) *Cole v. Moore*, Mo. 806, and *Curson v. Karville*, there cited; *Wind v. Jekyl*, 1 P. W. 572. See also 1 Ch. Cas. 8. And, generally, on a devise of a possibility coupled with an interest, of which nature is the possibility in a term of years devised by an executory devise, see *Roe v. Jones*, 1 Hen. Bl. 30, and *Jones v. Roe*, in error, 3 D. & E. 88, cited 8 East, 567, and 2 M. & S. 170.

(m) *Theobalds v. Duffoy*, 9 Mod. 101. See *Thomas v. Freeman*, 2 Vern. 563.

(n) 1 Atk. 280.

[*174] not voluntary, but for a valuable consideration.”(o) *These opinions appear to be authorities,(p) that, in equity, a husband may, for a valuable consideration, assign a term of years devised to his wife by an executory devise, and that this assignment will be binding on the wife, if the possibility falls into possession during the coverture. But such assignment will not, perhaps, be binding on the wife, if she survives her husband, who dies in the life-time of the tenant for life, and, consequently, before the possibility devised is fallen into possession.(q)

SECTION III.

OF CHOSSES IN ACTION OF A WIFE.

PERSONAL chattels consist of chattels in *possession*, and chattels in *action*. A chattel of the latter kind is technically called a *chose in action*; and is so denominated, because the chose, or thing so named, is, neither really nor constructively, in the possession of the owner of it, but is in the possession of some one else, from whom the owner is entitled to recover it, or, as it is said, to reduce it into possession, by an action at law, or suit in equity.(r)

Two sorts of choses in action are,—one which may be called a present chose in action, since it gives a present right of action;(s) and another, which is called a future,(t) or reversionary,(u) chose in action. The former may by action or suit be, at the present time, reduced into possession; the latter cannot be so reduced into possession, until some future period.(v)

In the number of chattels, that have been present choses in action, may be reckoned, stock in the public funds,(w) in a person's own

(o) 2 Atk. 208. See also ib. 551.

(p) On the same opinions see, however, 3 Russ. 71—83.

(q) See Theobalds v. Duffoy, 9 Mod. 102, cited 1 Ves. 20, 2 Atk. 208, 3 Atk. 533, and 3 Russ. 85; and Honner v. Morton, 3 Russ. 69, 85, 86. See likewise 1 Russ. 50, 51.

(r) 3 Ves. 469.

(s) 1 Russ. 44, 45, 67.

(t) 1 Russ. 50, 51.

(u) 3 Russ. 68.

(v) 1 Russ. 59, 60; 3 Russ. 69, 86.

(w) 1 Ves. jun. 198; 5 Price, 264, 266; 1 Ball & B. 389, 390. This occasion may be taken to notice the general nature of a sum of government stock. A person who owns a share of such stock, as 100*l.* 3 per cents, does not own a sum of money, which, although not in his own possession, somewhere exists, and is out at interest, but a nominal sum only, existing no where, but the proprietorship of which entitles the owner to receive an annuity, perpetual or limited according to the nature of the fund, which annuity is subject to redemption, and such proprietor is entitled, by selling the annuity, to turn his nominal

sum of stock into real money. (4 Ves. 751; 9 Ves. 177; 13 Ves. 45; 5 Price, 262, 263; The King v. Parish of St. John, Norwich, 6 East, 182.) Sir R. P. Arden has thus expressed himself on the subject;—"There is a very untechnical expression used with regard to stock. There is literally no such thing as 100*l.* stock. The 3 per cents are only perpetual annuities granted for ever, redeemable by the public upon the payment of a certain sum of money." (4 Ves. 751.) And where a person bequeathed to his wife "200*l.* per year, being part of the monies I now have in bank security," Sir W. Grant said, "The description of the subject of this bequest, 'part of the monies I now have in bank security,' is the correct mode of giving the absolute property in stock; for, strictly, the proprietor of stock has an annuity only, and no capital." (Rawlings v. Jennings, 13 Ves. 39, 45.) And in a case where it was held that stock was not included in the words "money out at interest," used in a particular statute, Lord Ellenborough stated—"money out at interest, however the lender may stipulate not to call for the principal for a given period, is

*name, (x) or in the name of a trustee; (y) a debt, (z) as, money due on a mortgage, (a) bond, (b) bill of exchange or promissory note; (c) arrears of a jointure charged on land; (d) a portion payable out of land; (e) a legacy; (f) a residue bequeathed; (g) a share of an intestate's estate; (h) a share of an intestate's estate paid into the Court of Chancery; (i) an orphanage part by the custom of London; (j) damages in an action of trespass. (k)

Among future choses in action, reversionary or contingent, may be enumerated,—a reversionary interest in money, or stock, expectant on a preceding life estate, limited of it; (l) a legacy bequeathed to A., when she shall attain the age of twenty-one; (m) a portion payable to A., on the contingency of her surviving her father; (n) or mother; (o) a legacy to A., on the contingency of her surviving her mother. (p)

Where, at the time of her marriage, or during the coverture, a wife is entitled to a present chose in action, if this chose in action is, during the coverture, either really reduced into the husband's possession, or virtually so, as by receipt by a third party of a legacy or debt, under a power of attorney from the husband and wife, or from the husband alone, to receive it; here, if the wife dies in the life-time of the husband, then, after

still a loan of money, with forbearance for a certain time. It implies that the principal is to be repaid at some time or other, when the lender will be entitled to receive it as money; and not a substitute for the principal in a mere annuity. But with respect to stock, the payment of the principal can never be compelled. All that the government engage for is, a perpetual annuity, redeemable at their own will and pleasure. Can we say, that stock is money out at interest? Money out at interest must mean that which is capable of being recalled at some time or other. Is that at all applicable to the funds, where the whole principal money is sunk in an annuity, and cannot be recalled, though in this stock parliament have reserved a power of redemption?" (6 East, 186.) An action at law, in which stock is sued for as money, cannot be sustained; as where the counts of the declaration are, for 2,000*l.* lent and advanced, 2,000*l.* had and received, &c. (Nightingall v. Devisme, 5 Burr. 2589, 2 W. Bl. 684.) Stock is a chose in action, which cannot, to pay creditors, be attached by the process of the Court of Chancery. (Dundas v. Dutens, 1 Ves. jun. 196, 198, cited 1 Ball & B. 389, and 2 Ball & B. 233; Caillaud v. Estwick, 2 Anstr. 381; Rider v. Kidder, 10 Ves. 360, 363, 369; Bank of England v. Lunn, 15 Ves. 569; Guy v. Pearkes, 18 Ves. 196; Cockrane v. Chambers, Amb. ed. Blunt, 79 n. See Taylor v. Jones, 2 Atk. 600, cited 10 Ves. 369; Horn v. Horn, Amb. 79; and King v. Dupinze, 2 Atk. 603, ed. Sand. n. (2).)

(x) Wildman v. Wildman, 9 Ves. 174.
(y) Becket v. Becket, 1 Dick. 340; Langham v. Neany, 3 Ves. 467.
(z) Miles' case, 1 Mod. 179.

(a) Burnett v. Kinnaston, 2 Vern. 401, Prec. Ch. 118.

(b) Huntley v. Griffith, Mo. 452; Lister v. Lister, 2 Vern. 68; Howell v. Maine, 3 Lev. 403, cited 2 M. & S. 396, and 2 Madd. Rep. 186, n.

(c) Holloway v. Lightbourne, 2 Madd. 135, n.; Lightbourne v. Holyday, S. C., 2 Eq. Cas. Abr. 1; Hodges v. Beverley, Bunb. 188; Connor v. Martin, cited 3 Wils. 5; Nash v. Nash, 2 Madd. 133. See also McNeillage v. Holloway, 1 Barn. & Ald. 218.

(d) Lord Carteret v. Paschal, 3 P. W. 197; Salwey v. Salwey, Amb. 692, 2 Dick. 434.

(e) Hurst v. Goddard, 1 Ch. Cas. 169; Incedon v. Northcote, 3 Atk. 430.

(f) Huntley v. Griffith, Mo. 452; Clerke v. Knight, Cas. T. Finch, 91.

(g) Grosvenor v. Lane, 2 Atk. 180; Oglander v. Baston, 1 Vern. 396.

(h) Squib v. Wyn, 1 P. W. 378; Wildman v. Wildman, 9 Ves. 174, 177.

(i) Johnson v. Johnson, 1 Jac. & W. 472, 475.

(j) Hinton v. Scot, Mos. 336.

(k) Milner v. Milnes, 3 Durnf. & E. 627, 629, 631.

(l) Gayner, or Gayer, v. Wilkinson, 2 Dick. 491; 1 Bro. C. C. 50 n.; Doswell v. Earle, 12 Ves. 473; Hornsby v. Lee, 2 Madd. 16; Purdew v. Jackson, 1 Russ. 1; Honner v. Morton, 3 Russ. 65.

(m) Brotherow v. Hood, Com. 725.

(n) Bash, or Bush, v. Dalway, 3 Atk. 530, 1 Ves. 19.

(o) Hornsby v. Lee, 2 Madd. 16.

(p) Grey v. Kourish, 1 Atk. 380, and ed. Sand. n. (3).

his death, his executor or administrator is entitled to the money.(q) And if such a present chose in action becomes, during the coverture, not, perhaps, properly speaking, a chose in possession, *but a chose [*177] vested in the husband, by means of a decree in equity, decreeing payment to the husband and wife, they being either plaintiffs or defendants in the suit; here, if the wife afterwards dies in the life-time of the husband, the money decreed to be paid belongs to the husband, by survivorship.(r) And in the case of such a joint decree, decreeing payment to the husband and wife, the money will, it appears, survive to the wife, if, before payment, the husband dies in her life-time.(s) And when a present chose in action becomes, during the coverture, a chose vested in the husband, by means of an arbitrator's award of payment to him;(t) or by a decree in equity, to pay to the husband alone in the right of his wife;(u) such chose in action, so become vested, is the husband's own property, and, in the case of his death in the life-time of his wife, will not survive to her, but will belong to his personal representative.

At law, a husband's interest in the choses in action of his wife is, his right to reduce them into his possession;(v) but when the chattel is a present chose in action, then, with reference to his power to dispose of it for a valuable consideration, his interest extends farther in a Court of Equity,(w) on the principle that what is agreed to be done, is, in this Court, considered as done.(x)

It appears to be clear, that if, for a valuable consideration, a husband assigns a present chose in action of his wife, this assignment is, in a Court of Equity, valid against the wife, notwithstanding the husband dies in her life-time,(y) and before the chose in action is reduced into possession.(z) [*178] But a wife's *present chose in action will, unless reduced into possession in the husband's life-time, survive to the wife, in the event of his death in her life-time, notwithstanding the husband's voluntary assignment of it.(a)

At law, a wife's present chose in action survives to her, if her husband dies in her life-time and before he has reduced it into possession.(b)

And, in equity, a wife's present chose in action survives, by a general rule, to her, in the event of her husband's death in her life-time, in cases where this right of survivorship is not defeated by an assignment, or

(q) *Huntley v. Griffith*, Mo. 452, 1 Rol. Abr. 342, D., 5, 6, 7.

(r) *Forbes v. Phipps*, 1 Eden, 502.

(s) *Nanney v. Martin*, 1 Ch. Rep. 233, 1 Ch. Cas. 27, 2 Freem. 172, cited 2 Sim. 177. See also *Mos. 234*, and *M'Clel. & Y. 57*.

(t) *Oglander v. Baston*, 1 Vern. 396, cited 1 Eden, 507.

(u) *Heygate v. Annealey*, 3 Bro. C. C. 362.

(v) 9 Ves. 99; 1 Russ. 25, 44, 57, 66; 3 Russ. 68.

(w) 9 Ves. 99, 1 Russ. 45, 59, 3 Russ. 68, 69, 85, 86.

(x) 3 Russ. 68, 69, 3 Atk. 524, 1 Ves. 20, 21.

(y) *Lord Cartwright v. Paschal*, 3 P. W. 197; *Paschal v. Thurston*, 8. C., 2 Bro. P. C. ed. Toml. 10, cited 9 Ves. 99; *Bates v. Dandy*, 2 Atk. 207, and also stated 1 Russ. 33, n.

and 3 Russ. 72, n.; *Bash, or Bush, v. Dalway*, 3 Atk. 530, 1 Ves. 19; *Johnson v. Johnson*, 1 Jac. & W. 472, 476.

(z) See, besides the authorities in the last note, *Earl of Salisbury v. Newton*, 1 Eden, 370, cited 4 Ves. 529.

(a) *Burnett v. Kinaston*, 2 Vern. 401, Prec. Ch. 118, 2 Freem. 289, cited 9 Ves. 99; *Becket v. Becket*, 1 Dick. 340. See also 2 Atk. 308. On a husband's release of a chose in action of his wife, see *Bro. Abr. tit. Bar. & Fem. 24, 44, 80*; 2 Rol. Rep. 134; 2 Freem. 241, 2 Vern. 191, Cas. T. Talb. 170, 2 Ves. 678, 2 Atk. 208, 1 Salk. 326, 1 Russ. 48—51, 3 Russ. 87, 88; and, farther, *Salkeld v. Vernon*, 1 Eden, 64.

(b) *Bro. Abr. tit. Bar. and Fem. 44*; *Co. Litt. 351, b*; 2 Vern. 69, 2 Freem. 102, 1 Russ. 25, 3 Russ. 68.

other act, capable of preventing it.(c) And also it may, in equity, survive to her, notwithstanding some act done by the husband, expressive of his title to receive it; as, notwithstanding—a voluntary assignment by the husband:(d) proof by him, under a commission of bankruptcy, of a debt due on bond to the wife, the husband dying before a dividend is made:(e) an action brought by husband and wife, for a debt due to the wife before marriage, and judgment for husband and wife, the husband, however, dying before execution sued out:(f) an agreement between the husband and an executrix, to appropriate a sum of money, due on mortgage to the testatrix, to pay a legacy of the same amount bequeathed to the wife, and subsequent receipts by the husband of the interest of the legacy, as of a sum secured by the mortgage:(g) a bill in equity filed by the husband and wife, making a demand in [*179] right of the wife:(h) a bill in equity filed against the husband and wife, and a decree that a third party bring a sum of money before a master, to be placed out at interest for the benefit of the parties, to whom the same should appear to belong, and payment to the master accordingly:(i) a bill in equity filed by the husband for money bequeathed to the wife, and a decree to lay out the money in the funds for the benefit of the husband and wife, subject to the farther directions of the Court:(j) a petition presented by husband and wife, reference to the Master to inquire what was due to the petitioners, report of principal and interest, order for payment to the petitioners of the interest, and payment to the husband accordingly:(k) bill by husband and wife in the Court of Exchequer, for a legacy bequeathed to the wife, and a decree directing the deputy remembrancer to take an account of the testator's debts and legacies, and to state what might remain unpaid, and to compute interest thereon; and death of the husband, before any farther proceedings had in the suit.(l)

When a wife is possessed of a present chose in action, her husband, by a general rule, becomes entitled to it, in the event of her death in his lifetime. But he takes it, not as survivor, but as the person entitled to administer to her.(m) As such administrator, he is liable to pay his wife's debts:(n) but he himself, and his personal representatives, will be entitled

(c) *Pheasant v. Pheasant*, 2 Ventr. 340, 1 Ch. Cas. 181; *Twisden v. Wise*, 1 Vern. 161; *Lister v. Lister*, 2 Vern. 68, 2 Freem. 102; *Howman v. Corie*, 2 Vern. 190; *Rudyard v. Netrin*, Prec. Ch. 209, 2 Eq. Cas. Abr. 137, in marg.; *Rudyard v. Nerne*, S. C., 2 Freem. 262; *Bates v. Dandy*, 2 Atk. 207, 1 Russ. 33, n., 3 Russ. 72, n.; *Langham v. Nenny*, 3 Ves. 467; *Macaulay v. Philips*, 4 Ves. 15; *Mitford v. Mitford*, 9 Ves. 87; *Wildman v. Wildman*, 9 Ves. 174; *Baker v. Hall*, 12 Ves. 497; *Wall v. Tomlinson*, 16 Ves. 418; *Nash v. Nash*, 2 Madd. 133.

(d) *Burnett v. Kinaston*, 2 Vern. 401, Prec. Ch. 118, cited 9 Ves. 99; *Garforth v. Bradley*, 2 Ves. 675, 678; *Becket v. Becket*, 1 Dick. 340.

(e) *Anon.* 2 Vern. 707.

(f) 1 Ch. Rep. 235, 2 Freem. 172, 1 Vern. 396, cited 1 Eden Rep. 507, Mos. 234,

390, 2 P. W. 497, Prec. Ch. 415, 3 Atk. 21, M'Clel. and Y. 56, 57.

(g) *Blount v. Bestland*, 5 Ves. 515.

(h) *Hervey v. Ashton*, Cas. T. Talb. 212, 217, Anon. 3 Atk. 726.

(i) *Nightingale v. Lockman*, Mos. 230, 390.

(j) *Bond v. Simmons*, 3 Atk. 20, cited 4 Ves. 18.

(k) *Hore v. Woulfe*, 2 Ball and B. 424.

(l) *Adams v. Lavender*, M'Clel. & Y. 41.

(m) *Hurst v. Goddard*, 1 Ch. Cas. 169; *Clerke v. Knight*, Cas. T. Finch, 91; *Squibb v. Wyn*, 1 P. W. 378, and 5th ed. n. (1); *Day v. Pargrave*, or *Padrohe*, cited 2 M. & S. 396, and stated *ibid.* n. (b.)—2 Freem. 241; 2 Bl. Com. 434; stat. 29 C. II. c. 3, s. 25. See also *Anon.* 2 Rol. Rep. 134; *Cary v. Taylor*, 2 Vern. 302; and *Plowd. Quær. Qu.* 265.

(n) 1 P. W. 380; 1 Eden Rep. 507.

to the surplus remaining. (o) And to this surplus, his personal representatives will, in equity, be entitled, in case of the husband's death, after he administered to his wife, and before the chose in action was reduced into possession, (p) or even in case of the husband's death before he took out administration to his wife. (q)

When a married woman is possessed of a contingent chose in action, it will by a general rule survive to her, if, while it continues to be contingent, her husband dies in her life-time. (r) If it is a contingent reversionary interest, expectant on an estate for life, and, during the contingency, the husband, for a valuable consideration, makes an assignment of it, and afterwards, in the life-time of the husband, such interest becomes vested, yet if he dies without any farther act done to reduce the chose in action into possession, his wife will be entitled to it by survivorship. (s) And although the wife's chose in action is a vested reversionary interest, which her husband, for a valuable consideration, assigns, yet, if he dies in her life-time, and while such interest is reversionary, it will survive to the wife, notwithstanding that assignment. (t)

It remains to mention, that, by means of a settlement made on a wife previously to her marriage, her husband may contract to purchase her choses in action, which either are her property at the time of the marriage, (u) or become her property during the coverture. (v) But, according to the modern doctrine, a mere settlement does not constitute such a contract; (w) and, to establish an agreement of this kind, it is essential [*181] *that "it be expressly so agreed between the parties, and that appears to be part of the consideration of the settlement." (x) The rule, says Sir W. Grant, is established, that to make the husband a purchaser of the whole fortune of his wife, "the settlement must either express, or clearly import, that intention." (y) Where such a purchase is effected, the chose in action of the wife will not survive to her, but will belong to the personal representatives of her husband, in the event of his death before it is reduced into his possession. (z) Several cases occur, in which it has been held that such a purchase was not effected; (a) and a consequence of this interpretation has been, that the chose in action survived to the wife, on the death of her husband in her life-time. (b)

(o) 1 P. W. 380.

(p) *Humphrey v. Bullen*, 1 Atk. 458, 1 West Cas. T. Hardw. 66.

(q) *Cart v. Rees*, stated *ibid.* 381; *Lady Aiscough's case*, stated *ibid.* 382; *Bacon v. Bryant*, 11 Vin. Abr. 88, Ca. 25, 2 Eq. Cas. Abr. 425, Ca. 15; *Elliot v. Collier*, 1 Ves. 15, 3 Atk. 526, 1 Wils. 168. See *Amhurst v. Selby*, 11 Vin. Abr. 377, Ca. 8, 2 Eq. Cas. Abr. 456, Ca. 1.

(r) *Brotherow v. Hood*, Com. 735; *Stamper v. Barker*, 5 Madd. 157.

(s) *Horneby v. Lee*, 3 Madd. 16, cited 3 Russ. 70. See 3 Russ. 69 and 86.

(t) *Purdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 65; *Watson v. Dennis*, *ibid.* 90.

(u) *Meredith v. Wynn*, Prec. Ch. 312, Gilb. Eq. Rep. 70; *Medith v. Wynn*, S. C., 1 Eq. Cas. Abr. 70; *Blois v. Viscountess Hereford*, 2 Vern. 501; *Norbone's case*, S. C., 2 Freem. 283; *Adams v. Cole*, Cas. T.

Talb. 168; *Sykes v. Meynal*, 1 Dick. 368, (in which last case, it may be mentioned, the settlement was made after marriage;) *Wharton v. Wharton*, 2 Keny. part 2, p. 99. See also *Cleland v. Cleland*, Prec. Ch. 63.

(v) *Garforth v. Bradley*, 2 Ves. 677; *Mitford v. Mitford*, 9 Ves. 87, 95, 96; *Carr v. Taylor*, 10 Ves. 579.

(w) *Heaton v. Hassell*, 4 Vin. Abr. 40, in marg., 2 Eq. Cas. Abr. 467; *Garforth v. Bradley*, 2 Ves. 677, cited 9 Ves. 96.

(x) 4 Vin. Abr. 40, in marg.; 2 Eq. Cas. Abr. 467, in marg.

(y) 10 Ves. 579.

(z) *Meredith v. Wynn*; *Blois v. Viscountess Hereford*; *Norbone's case*, S. C.; *Adams v. Cole*; *Sykes v. Meynal*; and *Wharton v. Wharton*; above.

(a) *Burdon v. Dean*, 2 Ves. jun., 607; *Carr v. Taylor*, 10 Ves. 574, 579.

(b) *Lister v. Lister*, 2 Vern. 68, 2 Freem. 102; *Rudyerd v. Nerne*, 2 Freem. 263; *Rud-*

*CHAPTER XII.

[*182]

OF CERTAIN PROPERTY HELD TO BE PERSONAL ESTATE OF A PERSON DECEASED; AND OF RENT, EMBLEMENTS, AND MORTGAGE-MONEY.

SECT. I. *Of certain Property held to be personal Estate of a Person deceased.*

II. *Of Rent.*

III. *Of Emblements.*

IV. *Of Mortgage-Money.*

SECTION I.

OF CERTAIN PROPERTY HELD TO BE PERSONAL ESTATE OF A PERSON DECEASED.

GENERALLY speaking, all personal property, which devolves to an executor, is assets in his hands, (a) Several cases may, therefore, here be referred to, in which property particularly circumstanced has by or in a Court of Law, (b) and, in other instances, *by or in a Court of Equity, (c) been held to be personal estate of a person de- [*183]

yard v. Netrin, S. C., Proc. Ch. 209, 2 Eq. Cas. Abr. 137, in marg.; Heaton v. Hassell, 4 Vin. Abr. 40, in marg., 2 Eq. Cas. Abr. 467; Garforth v. Bradley, 2 Ves. 675; Salway v. Salway, Amb. 692, 2 Dick. 434; Druce v. Denison, 6 Ves. 385, 395; Mitford v. Mitford, 9 Ves. 87, 95, 96.

(a) 6 Co. 47 b.; 3 Atk. 467; 1 Russ. 585, 597; 2 Bl. Com. 510. An exception is, an executor's right to present to a church; in a case, where a person, seised in fee of an advowson, dies, and, the church being void before and at his death, the presentation falls, as a chattel, to his executor. Bro. Abr. tit. *Present. ad Ecclesie*, 34; Co. Litt. 389 a.; 7 B. & C. 147, 180, 185, 195.

(b) Harvey v. Harvey, 2 Stra. 1141; Anon. case on a cyder mill, cited in Lawton v. Lawton, 3 Atk. 14, 16, and in Lawton v. Salmon, 1 Hen. Bl. 259, n.; Lawton v. Lawton, S. C., 3 Atk. ed. Sand. 16, n., and Amb. ed. Blunt, 114 n.; Bearpark v. Hutchinson, 7 Bingh. 178. "Wood felled and severed from the ground," is, as between heir at law and executor, personal estate. And so are trees bought by a person, who dies before they are felled. (Wentw. Off. Ex. ch. 5, 14th ed. p. 142, 248; God. Orph. Leg. part 2, ch. 13, 2nd ed. 123, 123, 124, 125.) "Dung may be a chattel, and it may not be a chattel; for a heap of dung is a chattel, but if it be spread

upon the land it is not:" By Roll, J., in Carver, or Yerworth, v. Pierce, Style, 68, Aleyn, 32. "Pictures and glasses, generally speaking, are part of the personal estate, yet if put up instead of wainscot, or where otherwise wainscot would have been put, they shall go to the heir." Cave v. Cave, 2 Vern. 508. On questions between executor and heir on the title to particular kinds of property, see, farther, Swinb. on Wills, part 6, sect. 7; Wentw. Off. Ex. ch. 5; God. Orph. Leg. part 2, ch. 13; and 11 Vin. Abr. tit. Executors, U. Z. and Z. 2; and on similar questions relative to fixtures, and certain other descriptions of property, see Amos and Fer. on Fixtures, ch. 4.

(c) Stubbs v. Stubbs, Cas. T. Finch, 415; Lord Gorge v. Dillington, 1 Ch. Rep. 281; Cotton v. Cotton, 2 Ch. Rep. 188; Earl of Winchelsea v. Norcliffe, ib. 367, 377, 1 Vern. 435, 2 Freem. 95; Anon. 2 Freem. 114, Ca. 126; Anon. ib. 210, Ca. 284 b.; Squier v. Mayer, ib. 349; Hulbert v. Hart, 1 Vern. 133; Awdley v. Awdley, 2 Vern. 192; Jenison v. Lord Lexington, 1 P. W. 555; Lawton v. Lawton, 3 Atk. 13; Lord Dudley v. Lord Warde, Amb. 113; Wade v. Paget, 1 Bro. C. C. 363, 1 Cox, 74; Russell v. Symthes, 1 Cox, 215; Anon. cited 7 Ves. 437; Triquet v. Thornton, 13 Ves. 345; Collier v. Squire, 3 Russ. 467; Wigswell v. Wigswell, 2

ceased. In a Court of Equity, a lease of a testator, renewed by his executor, has been determined to be part of the testator's personal estate.^(d) And the same Court has held to be personal estate of a person deceased, real estate by a deed of partnership converted into personalty;^(e) also real estate contracted to be sold; a binding contract to sell having, in a Court of Equity, the force to convert the real estate into personalty, although the party who sells, dies before the contract is carried into execution;^(f) in cases, that is, where one or other of the contracting parties is entitled in a Court of Equity to carry the contract into execution; in other words, where there is "an effectual agreement binding on all parties, so as, under all the circumstances, it ought to be carried into execution, upon this general principle of Equity, that what is contracted for valuable consideration to be done, will by the Court be considered as done."^(g) Shares in a newspaper, and of the profits of printing it subsequent to a testator's death, have been held to be part of his personal estate.^(h) River, or canal, shares are in some instances real, and in others personal, estate. New River shares, or shares of the New River Water, are real estate.⁽ⁱ⁾ And so likewise are shares in the navigation of the River Avon, made navigable by a statute 10 Anne.^(j) Shares in the Worcester and Birmingham Canal Navigation are, by the Act passed for making the canal, made personal estate.^(k) And here it may be mentioned, that fixtures on leasehold premises belonging to a testator, and which he had a right to remove, have been determined to be mere personal chattels, and therefore to pass under a bequest for charitable purposes.^(l)

Both at Law and in Equity, rent^(m) and emblements⁽ⁿ⁾ are often the

Sim. and St. 364. On property in a medical secret, recipe, receipt, or nostrum, see *Jenks v. Holford*, 1 Vern. 61; *Tipping v. Tipping*, 11 Vin. Abr. 244, Ca. 15, 2 Eq. Cas. Abr. 467, Ca. 14, cited 9 Mod. 460; *Newbery v. James*, 2 Mer. 446; *Williams v. Williams*, 3 Mer. 157; *Yovatt v. Winyard*, 1 Jac. & W. 394; and *Green v. Folgham*, 1 Sim. & St. 398. And on property in a secret in trade, see *Bryson v. Whitehead*, 1 Sim. & St. 74.

^(d) *Holt v. Holt*, 1 Ch. Cas. 190; *Anon.* 2 Ch. Cas. 207; *Walley v. Walley*, 1 Vern. 484. See also *James v. Dean*, 11 Ves. 383, and *Ray v. Ray*, Coop. 264.

^(e) *Ripley v. Waterworth*, 7 Ves. 425.

^(f) *Lacon v. Mertins*, 3 Atk. 1; *Mayer v. Gowland*, 2 Dick. 563; *Howse v. Chapman*, 4 Ves. 542, 550; *Lawes v. Bennett*, 1 Cox, 167, also stated 7 Ves. 496, and 14 Ves. 596; *Townley v. Bedwell*, 14 Ves. 591; *Greene v. Greene*, 4 Madd. 148.

^(g) *Attorney General v. Day*, 1 Ves. 218, 320; *Buckmaster v. Harrop*, 7 Ves. 344, 345; *Johnson v. Legard*, 1 Turn. & R. 281. On the same principle, where real estate is agreed to be bought, the price to be paid is, by the contract, made real estate of the purchaser. *Green v. Smith*, 1 Atk. 572, 1 West Cas. T. Hardw. 561, cited 10 Ves. 613; *Cave v. Cave*, 2 Eden, 139; *Buckmaster v. Harrop*,

7 Ves. 341; *Broome v. Monck*, 10 Ves. 597; *Savage v. Carroll*, 1 Ball & B. 265; *Rawlins v. Burgis*, 2 V. & B. 382, 387.

^(h) *Gibblett v. Read*, 9 Mod. 459. See also *Longman v. Tripp*, 2 Bos. & P. N. R. 67. That a share in a newspaper is devisable, see *ibid.* 71, 9 Mod. 460, and *Keene v. Harris*, cited 17 Ves. 338, 342, and in 1 Rose, 125. In *Hogg v. Kirby*, 8 Ves. 217, it is stated by counsel, that "it has been determined that property exists in a newspaper, and that an action lies for publishing under the same title."

⁽ⁱ⁾ *Drybutter v. Bartholomew*, 2 P. W. 127; *Lord Townsend v. Ash*, 3 Atk. 336; *Nicholls v. Leeson*, *ibid.* 573; *Lord Sandys v. Sibthorpe*, 2 Dick. 545; *Adair v. The New River Company*, 11 Ves. 429. See also 2 Ves. 182, and 2 Ves. jun. 668. Acts of Parliament establishing the New River are, 3 Jam. I. c. 18, and 4 Jam. I. c. 12; on which statutes, see the observation made by Sir R. P. Arden, 2 Ves. jun. 668.

^(j) *Buckeridge v. Ingram*, 2 Ves. jun. 652; *Howse v. Chapman*, 4 Ves. 542, 544.

^(k) Stat. 31 Geo. III. c. 59; *Ex parte v. Horne*, 7 B. & C. 632.

^(l) *Johnston v. Swann*, 3 Madd. 457.

^(m) 10 Co. 128 b.

⁽ⁿ⁾ Litt. S. 68; Co. Litt. 55 b; 3 Atk. 16.

personal estate of a person deceased. And in Equity a mortgage, pledge and money, is personal estate.^(o) These three kinds of personalty, rent, emblements, and mortgage-money, property which very commonly belongs to a testator, and is frequently of great value and importance, it is proposed to make the subjects of the remaining sections of this chapter.

*SECTION II.

[*185]

OF RENT.

THE following distinctions occur on rent unpaid at the death of a lessor, who is seised in fee-simple. If a person, seised in fee, leases for years, with a reservation to himself and his heirs of rent payable at certain days, it is clear that if the lessor dies after either rent day, all the rent due at the last rent day will devolve to his executors.^(p) And it is also certain, that if the lessor dies before either rent day, the rent, which will on that day become due, will follow the reversion, and belong to the heir at law, to whom the reversion is descended;^(q) or to the devisee, to whom the reversion is devised;^(r) except in particular cases; for the rent may be separated from the reversion,^(s) and be made, it appears, the subject of a bequest.^(t) If the lessor dies on a rent day, it seems that the rent, on that day become due, will, unless separated from the reversion, belong to the heir at law or devisee, if the lessor dies before sunset;^(u) but it is perhaps doubtful to whom it will belong, if the lessor dies after sunset, and before midnight.^(v)

*SECTION III.

[*186]

OF EMBLEMENTS.

THE next kind of personal property reserved for particular notice is

(*o*) *Bridgman v. Tryer*, *Case*. T. Finch, 236; *Gardner v. Hatton*, *ibid.* 318; *Corsellis v. Corsellis*, *ibid.* 351; *Canning v. Hicks*, 1 Vern. 412, 2 Ch. Cas. 187; *Clerkson v. Bowyer*, 2 Vern. 66; *Owen v. White*, 3 Ch. Rep. 20, 2 Freem. 126; *Anon.* 2 Freem. 52, Ca. 57; *Fiak v. Fiak*, *Pres. Ch.* 11; *Austen v. Executors of Dodwell*, 1 Eq. Cas. Abr. 318, Ca. 9; *Kendal v. Mickfeild*, *Barn. Ch. Rep.* 46; *Casberne v. Scarfe*, 1 Atk. 605.

(*p*) 10 Co. 128 b.

(*q*) *Anon.* Mich. 34 H. VIII. cited in *Clun's case*, 10 Co. 128 b., 1 Rol. Abr. 591, B. 3; *Drake v. Munday*, *Cro. Car.* 207.

(*r*) *Finch*. N. B. 121, N.; 10 Co. 129 a.; 2 Bl. Com. 176; *Sacheverell v. Frogate*, 1 Vent. 148, 161.

(*s*) Co. Litt. 143 a.; 2 Bl. Com. 176; *Robins v. Cox*, 1 Lev. 22.

(*t*) Litt. S. 585; *Arden, or Arge, v. Watkins*, *Cro. Eliz.* 637, 651, Mo. 549, 1 Rol. Abr. 234. See 1 Lev. 22, and *Knolles' case*, 1 Dyer, 5 b.

(*u*) *Lord Rockingham v. Oxenden*, or *Penrice*, 2 Salk. 578, 1 P. W. 177. See *Anon.* *Gouldsb.* 98, Ca. 17.

(*v*) See *Plowd.* 172, 173; Co. Litt. 202 a.; *Duppa v. Mayo*, 1 Saund. 282, 287; *Thomson, v. Field*, *Cro. Jac.* 499; *Lord Rockingham v. Penrice*, 1 P. W. 177; *Southern v. Bellasis*, *ib.* 179, n.; and *Earl of Strafford v. Lady Wentworth*, 9 Mod. 21, *Pres. Ch.* 555.

Emblements.(w) Emblements are certain kinds of the earth's produce, which, in some cases, after land is no longer occupied by the party who owned such produce, may be severed and carried away from the land as part of his property. The general principle of a right to emblements is, public policy, which, for the common good, gives encouragement to husbandry.(x) Wheat, and oats, and other corn, beans, peas, potatoes, hemp, flax, and hops, are emblements.(y) It seems also to be understood that turnips, carrots, and parsnips, are emblements; and that clover, saintfoin, saffron, melons, cucumbers, and artichokes are so likewise.(z) But grass, although the product of hay-seed sown, is not emblements.(a)

Emblements may belong to a lessee at will; to the executors of a lessee at will; to the executors of a tenant for life, and of other tenants, whose estates are determinable on death; to a husband seised in right of his wife; to a tenant *pur auter vie*; to a lessee for years of a tenant for life, and of other tenants, whose estates are determinable on death; to the executors of a lessee for years, if he shall so long live; to the executors of a tenant in tail; and of a tenant in fee; to a devisee of a tenant in fee; [*187] and to the survivor of joint-tenants. And here it may be mentioned, that, amongst farther instances,(b) a question on the title to emblements may occur in the cases of a copyholder,(c) of a parson, (d) of a feoffee on condition,(e) of a mortgagor,(f) of a posthumous son and heir at law,(g) of a tenant by extent under a statute or recognizance,(h) of one who by action at law recovers land,(i) of a widow to whom dower is assigned, or by whom it is recovered by action at law,(j) of one who enters by title,(k) and lastly in instances of disseisin,(l) or outlâwry.(m)

(w) From *embleer*, signifying to sow; Bro. Abr. tit. Embleem. pl. 1, 9. See Spelm. Gloss. v. Bladum. Generally on Emblements, see that title in the Abridgments of Brooke, Rolle, and Vinier; Perkins, 512—524; Gilb. on Evidence, 4th ed. 240—249; and Amos & Fer. on Fixtures, &c., 173.

(x) Co. Litt. 55 a.; 2 Inst. 81; Hob. 132; 3 Atk. 16; 2 Bl. Com. 122.

(y) Litt. S. 68; Co. Litt. 55 b.; 2 Inst. 81; Keilw. 125; 2 Bl. Com. 123; Latham v. Atwood, Cro. Car. 515; Anon. 2 Freem. 210, Ca. 284 b.; Fisher v. Forbes, 9 Vin. Abr. 373, 2 Eq. Cas. Abr. 392; West v. Moore, 8 East, 339, 340; Evans v. Roberts, 5 B. & C. 829, 832.

(z) Co. Litt. 55 b.; 5 B. & C. 835; 4 Burn's Eccl. L. 7th ed. 299; Toll. Execut. 150. Amos & Fer. on Fixt. 174.

(a) Co. Litt. 56 a.; 2 Inst. 81; 5 B. & C. 832; 2 Bl. Com. 123.

(b) Bro. Abr. tit. Embl. 13, 16, 21, 25; Launton's case, 4 Leon. 1; Grantham v. Hawley, Hob. 132; Wicks v. Jordan, 2 Bulstr. 218, 9 Vin. Abr. 373; Banks' case, 9 Vin. Abr. 373; Johns v. Whitley, 3 Will. 127.

(c) Bro. Abr. tit. Embl. 4, tit. Forf. de ter. 109; 4 Co. 21 b.; 1 Rol. Abr. 737, pl. 18; 9 Vin. Abr. 367, pl. 18; Oland's case, or

Oland v. Burdwick, 5 Co. 116, Cro. Eliz. 460, Gouldsb. 189.

(d) Bro. Abr. tit. Embl. 2, 9, tit. Dean & Ch. 1; 1 Rol. Abr. 655, K. 3; Stat. 28 H. VIII. c. 11; Bulwer v. Bulwer, 2 Barn. and Ald. 470.

(e) Bro. Abr. tit. Chattels, 10, tit. Embl. 18.

(f) Keech v. Hall, Doug. 23; Moss v. Gallimore, ib. 270, 4th ed. 283; Christophers v. Sparke, 2 Jac. & W. 234, 235.

(g) Co. Litt. 55 b.; Perk. pl. 521.

(h) Co. Litt. 55 b.; Barden v. Withington, 2 Leon. 54.

(i) Bro. Abr. tit. Embl. 8, 11, 23; Perk. pl. 515.

(j) 2 Inst. 81; Perk. pl. 521; 9 Vin. Abr. 367, pl. 19; Anon. 3 Dyer, 316 a., Ca. 2; Fisher v. Forbes, 9 Vin. Abr. 373, 2 Eq. Cas. Abr. 392.

(k) Bro. Abr. tit. Embl. 25; Co. Litt. 55 b.

(l) Bro. Abr. tit. Chattels, 10, tit. Embl. 1, 10, 12, 13, 17, 18, 19, 20, tit. Tresp. 302; 1 Rol. Rep. 101; Jenk. Cent. C. 5, ca. 29; Perk. pl. 519; Co. Litt. 55 b.; Knivet's case, or Knevett v. Pool, 5 Co. 85, Cro. Eliz. 463, Gouldsb. 143; Liford's case, 11 Co. 46 b., 51 b.; Anon. 1 Dyer, 31 b., ca. 219; Anon. Mo. 24, ca. 84; Anon. Dalis. 30, ca. 8.

(m) 5 Co. 116 b.

Corn, or other kind of emblements, belongs to a lessee at will, if the lessor puts him out before it is ripe, *(n)* or, if ripe, before it is in the due course of husbandry severed. *(o)* In the event of the tenant's death before severance of emblements, they belong to the executors of a lessee at will, *(p)* of a tenant for life, *(q)* of a tenant in dower, *(r)* and of a tenant by the curtesy. *(s)* If a husband seised in right of his wife dies before severance of emblements, they belong to his executors. *(t)* Also emblements belong to a husband seised in right of his wife if the wife dies before they are severed: *(u)* and likewise to a tenant *pur auter vie*, if before severance the *cestui que vie* dies. *(v)* And if a tenant for life, or doweress, or tenant by the curtesy, or husband seised in right of his wife, or *cestui que vie*, dies before severance of emblements, they belong to the lessee for years of the tenant for life, *(w)* or doweress, *(x)* or tenant by the curtesy, *(y)* or husband seised in right of his wife, *(z)* or tenant *pur auter vie*. *(a)* And if a lease for years is made by a husband seised in fee in right of his wife, and the wife dies, and then the lease determines, the lessee has the right to the emblements. *(b)* And if a lease is made to A. for a term of years, if he shall so long live, the executors of A. are entitled to the emblements growing on the land at the time of his death. *(c)*

One principle which makes certain roots, and the crops of particular seeds sown, to be emblements is, that such roots and crops are annual vegetables, *(d)* And two farther principles, on which emblements belong to the particular party in each of the cases mentioned, are,—first, that such emblements are the fruit of the expense or labour of the lessee at will, or of the tenant for life, or other tenant whose estate is determinable on death: *(e)* and, secondly, that the estate of the lessee at will, and of the tenant for life, or other tenant whose estate is determinable on death, is of uncertain continuance; the estate at will being determined by the lessor, or by his death, or that of the lessee, and the estate of each of the other tenants being determined by death, *as [*189] before is mentioned. *(f)* The same principles extend, it appears, to a deceased tenant in tail, whose executors are entitled to the emblements, which are the fruit of his own expense or labour, and are growing on the land at the time of his death. *(g)* A farther principle, on

(n) Litt. s. 68; Bro. Abr. tit. Embl. 7, tit. Ten. per Copie, 3; Cas. T. Holt, 414.

(o) Co. Litt. 55 b.; Cas. T. Holt, 414.

(p) Co. Litt. 55 b.; Bro. Abr. tit. Embl. 6.

(q) Fitzh. Abr. tit. Devise, 25; Co. Litt. 55 b.; Latham v. Atwood, Cro. Car. 515; Fisher v. Forbes, 9 Vin. Abr. 373, 2 Eq. Cas. Abr. 392.

(r) And the doweress may dispose of them by her will, Stat. of Merton, C. 11; 2 Inst. 80, 81; Fitzh. Abr. tit. Devise, 26; Bro. Abr. tit. Embl. 22; Perk. pl. 522, 523; Anon. Keilw. 125, ca. 84.

(s) Perk. pl. 514.

(t) Bro. Abr. tit. Embl. 26; Co. Litt. 55 b; Perk. pl. 518.

(u) Co. Litt. 55 b.

(v) Bro. Abr. tit. Embl. 6, 16; Co. Litt. 55 b.

(w) Co. Litt. 55 b., 56 a.; Knivet's case, or Knevett v. Pool, 5 Co. 85; Cro. Eliz. 463.

(x) Ibid.

(y) Perk. pl. 514.

(z) Bro. Abr. tit. Embl. 6, 14, tit. Lease, 24; Co. Litt. 56, a.

(a) Co. Litt. 55 b., 56 a.; Perk. pl. 518.

(b) Perk. pl. 518.

(c) 1 Rol. Abr. 727, pl. 12; 9 Vin. Abr. 366, pl. 12.

(d) Co. Litt. 55 b.; 2 Inst. 81; Keilw. 125.

(e) Co. Litt. 55 b.; 2 Inst. 81; Hob. 132; Cro. Car. 515; 2 Free. m210; 9 Vin. Abr. 366, pl. 12.

(f) Litt. s. 68; Co. Litt. 55 b.; Perk. pl. 518; 9 Vin. Abr. 366, pl. 12; 2 Barn. and Ald. 471.

(g) Perk. pl. 59, 512; Shep. Touch. 472.

which, in certain cases, a claim to emblements may be supported is, that the tenant's estate was determined by the act of law.^(h)

The principle mentioned of uncertainty of estate appears not to apply to emblements of a deceased tenant in fee, and the title to which is disputed between his executor, and his heir at law to whom the land is descended. Here, after the death of the tenant, the land and emblements continue to be the property of himself, represented by either his heir at law or executor. And the emblements the law gives to the executor.⁽ⁱ⁾ And this is done perhaps on the principle, that the expense and labour, of which the emblements are the fruit, were bestowed on the land with the intent to reap a return in personal estate; and that had the crop been severed in the tenant's life-time, it would have been property of that nature. And so far as the crop is raised at the expense of the deceased tenant, the claims of simple contract creditors to debts, and of younger children to portions, out of property raised by a fund naturally liable to those debts and portions, are evidently additional weights to incline the law to give such emblements to the executor in preference to the heir. If a person buys the fee-simple of land, on which there are then emblements, and dies before severance, and the land descends, in this case also the executor will certainly be entitled to them. And the principle may be, that the purchaser bought the crop with the intent to make it part of his personal estate, and that had it been severed in his life-time, it would have been personal property.

[*190] *The emblements of a deceased tenant in fee go to his executor, when the land descends; but if it is devised by him, they go with the land to the devisee.^(j) The principle perhaps is, analogy to the force of a gift by feoffment, whereby when the land itself passes, "vesture, herbage, trees, mines, and all whatsoever parcel of that land doth pass."^(k) The devisee will, however, not be entitled to the emblements if the will contains a bequest of personal estate, described in terms which disclose an intention to include emblements in the bequest;^(l) as where a bequest to executors is in the terms, "all my goods and chattels, stock of my farm, and all other my moveables whatsoever,"^(m) or, "all my stock upon my farm, and all other my personal estate of what nature or kind soever."⁽ⁿ⁾ But it is not clear that the emblements will not belong to the devisee of the land, although the will contains a bequest in the general terms of "all my personal estate of what nature or kind soever," or, "all my goods and chattels, and all other my moveables whatsoever;" and particularly if the bequest is to a beneficial legatee, and not for the purposes mentioned in the will, to the executors.

If the devise of the land is to the testator's heir at law, and notwithstanding the devise, which has not the force to break the descent, the heir takes by descent, and not under the will, and the will does not contain a separate disposition of the emblements, it is, perhaps, a consequence of the descent, that the emblements will go to the testator's executors, and will not belong to the heir.

(h) 5 Co. 116 b.; Cro. Eliz. 461.

(i) 2 Inst. 81; Hob. 132; 3 Atk. 16; 8 East, 343; 5 B. & C. 832; 2 Bl. Com. 404; Laulton's case, 4 Leon. 1; Emerson v. Emerson, or Annison, 1 Vent. 187, 2 Keb. 874; Anon. 2 Freem. 210, Ca. 284 b.

(j) Anon. Cro. Eliz. 61; Spencer's case, Win. 51, 9 Vin. Abr. 372; Cox v. Godsalve, 6 East, 604, n.; West v. Moore, 8 East, 343.

(k) Co. Litt 4 b.; 2 Bl. Com. 18.

(l) Perk. pl. 512.

(m) Cox v. Godsalve, 6 East, 604, n.

(n) West v. Moore, 8 East, 339.

It remains to mention an instance, where the principle of public policy, applied to emblements, may at first sight be thought to be disregarded. The instance is, of a joint-tenancy. For here, if the land survives, the emblements survive with it, and do not go to the executors of the deceased tenant.^(o) In truth, however, the public is probably very rarely, if ever, injured by this *circumstance; because in a multitude of instances the chances of survivorship are extremely equal; [*191] and where they are unequal, as by reason of age or infirmity, few persons are likely to leave the land unsown, in despair of living through the year to reap the produce, and because they attach no weight whatever to their own chance of surviving.

If joint-tenants are husband and wife, and the husband sows the land and dies before severance, it seems to be doubtful, whether the emblements will survive to the wife, or will belong to the executors of the husband.^(p)

A claim to emblements may fail, if, to support it, it needs the principle of expense or labour, and this principle is wanting.^(q) And, accordingly, if in a voluntary conveyance, or in a will, land is limited to A. for life, with a remainder over, as to B. for life, and at the death of A. the corn, which is then on the land, and which was growing at the time of the conveyance, or death of the testator, was not sown at A.'s own expense, such emblements will with the land pass to the remainder-man B.^(r) And it is said that the emblements do not belong to the executors of a person, who marries a doweress, or tenant for life, or in fee, by whom the land was sown before her marriage with this husband.^(s)

Also a claim to emblements may fail, if the principle of uncertainty of estate is wanting. In the case of a lessee for a term of years, created by one whose estate is not uncertain, as by a termor for years, or person seised in fee, the emblements, which are growing on the land at the end of the lease, belong to the lessor, and not to the lessee or his executors.^(t)

In certain cases, a claim on the part of the tenant to emblements may *fail, if his estate is determined by his own act,^(u) as by forfeiture,^(v) or surrender,^(w) or, in the case of a tenancy at will, by [*192] his own determination of the tenancy.^(x) In a late case, a farm was let under a condition that if the lessee should incur any debt, upon which any judgment should be signed, and on which judgment any writ of execution should issue, it should be lawful for the lessor to re-enter. Judgment being signed against the lessee for a debt, and a *fi. fa.* issued thereupon, the

(o) *Geanes, or James, v. Portman*, Cro. Eliz. 314, Owen, 102, 9 Vin. Abr. 371; *Rowney's case*, 2 Vern. 323.

(p) Bro. Abr. tit. Embl. 15; Co. Litt. 55 b.; Anon. 3 Dyer, 316 a., Ca. 2; Anon. Cro. Eliz. 61; *Arnold v. Skeale, or Skele v. Arnoll, Noy*, 149, 1 Rol. Abr. 727, pl. 16, 3 Dyer, 316 a. n., Co. Litt. 55 b., Hal. n.; *Brewster's case*; Co. Litt. 55 b., Hal. n.; *Rowney's case*, 2 Vern. 323.

(q) Hob. 132.

(r) Hob. 133; Anon. Cro. Eliz. 61; *Allen's case*, cited Winn. 51, 9 Vin. Abr. 371; Anon. Godb. 159, Ca. 219.

(s) Bro. Abr. tit. Embl. 26; 1 Rol. Abr. 727, pl. 17; 9 Vin. Abr. 37, pl. 17.

(t) Litt. S. 68; Dougl. Rep. 196, 4th ed. 206.

(u) Co. Litt. 55 b.; 2 Inst. 81; 2 Bl. Com. 145; *Oland's case*, or *Oland v. Burdwick*, 5 Co. 116, Cro. Eliz. 460, Mo. 394, Gouldsb. 189; *Bulwer v. Bulwer*, 2 Barn. & Ald. 470.

(v) Bro. Abr. tit. Embl. 3; *Forfeist. deter.* 109; Co. Litt. 55 b., 4 Co. 21 b.; Cro. Eliz. 461; Gouldsb. 189; Perkins, pl. 515.

(w) Cro. Eliz. 461.

(x) Co. Litt. 55 b.; 5 Co. 116; Cro. Eliz. 461; 2 Bl. Com. 146; *Weeper v. Handall*, 1 Rol. Abr. 727, 9 Vin. Abr. 366; *Sweeper v. Randal*, S. C., Cro. Eliz. 156, 9 Vin. Abr. 371.

lessor re-entered, and took possession of the growing crops. And to those crops or emblements, it was decided the lessor was entitled, the lessee having broken the condition, and incurred a forfeiture by his own act.(y)

SECTION IV.

OF MORTGAGE-MONEY.

FORMERLY, where a mortgage was made in fee, and forfeited, the money due on it was, in several cases, decreed to be paid to the heir, and not to the executor of the mortgagee;(z) if, without this money, the personal assets of the mortgagee were sufficient for the payment of his debts.(a) For it seems, that if the personal assets were insufficient for that purpose, the executor, and not the heir, was entitled to the mortgage-[*193] money, or at least to so much of it, as was required for the payment of debts.(b) It appears, however, from many later opinions and decisions, that the modern doctrine is, that the executor, and not the heir, of the mortgagee is entitled to the money: although the condition to redeem is on payment to the mortgagee or his heirs, or heirs or assigns, and notwithstanding the personal assets of the mortgagee are more than sufficient for the payment of his debts.(c) And, on greater reason, it is decided that mortgage-money belongs to the executor, and not to the heir, of the mortgagee, if the condition to redeem is merely on payment of the money, without naming any one to whom it is to be paid;(d) or on payment to the mortgagee, his executors, or administrators;(e) or to him, his executors, or assigns, or executors, administrators, or assigns;(f) or to him, his heirs or executors, or to him, his heirs, executors, administrators, or assigns.(g) And in all these cases, in which mortgage-money is payable to the executor, it is also payable to him, if the mortgagee dies before the mortgage is forfeited, and the money is paid either before or after the forfeiture.(h)

(y) *Davis v. Eytton*, 7 Bingham 154.

(z) *Tilley v. Egerton*, 1 Ch. Rep. 181, 3 Ch. Rep. 63, 2 Freeman 125, cited 1 Ch. Cas. 88, and 3 Swanst. 631; *Smith v. Smoult*, 1 Ch. Cas. 88; *Martin v. Gobe*, stated 3 Swanst. 633, and apparently cited as *Gobe v. Earl of Carlisle*, 2 Vern. 67; *Anon.* cited 3 Swanst. 634. See also *Alston v. Walker*, 1 Brownl. & G. 64; *Saint John v. Wareham*, or *Grabham*, stated 3 Swanst. 631, and cited 1 Ch. Cas. 88, 2 Freeman 126, and 3 Ch. Rep. 64.

(a) 1 Ch. Rep. 183; 1 Ch. Cas. 88; *Nels. Rep.* 162; 3 Swanst. 633, 634.

(b) 1 Ch. Rep. 183; 1 Ch. Cas. 88; *Anon.* *Nels.* 162. See 1 Ch. Cas. 286, 2 Freeman 144, and 3 Swanst. 630.

(c) *Winn v. Littleton*, or *Littleton's case*, 1 Vern. 3, 2 Ch. Cas. 51, 2 Vent. 351; *Canning v. Hicks*, 1 Vern. 412, 2 Ch. Cas. 187; *Pawlett v. Attorney General*, Hardr. 467, 469; *Turner v. Turner*, 2 Ch. Rep. 154; *Thornborough v. Baker*, 3 Swanst. 629, 630; *Stokes v. Verrier*, ib. 634.

(d) *Thornborough v. Baker*, 3 Swanst. 629, 1 Ch. Cas. 284, 285, 2 Freeman 143; *Anon.* 2 Freeman 12 Ca. 11; *Tabor v. Tabor*, 3 Swanst. 636.

(e) *Smith v. Smoult*, 1 Ch. Cas. 88; *Pawlett v. Attorney General*, Hardr. 467; *Lord Gorge v. Dillington*, 1 Ch. Rep. 279; and stated 3 Swanst. 633.

(f) *Stanley v. Mandesey*, 1 Ch. Rep. 254; *Lord Gorge v. Dillington*, ib. 279.

(g) *Anon.* 3 Leon. 32; *Anon.* 2 Freeman 12 Ca. 11; *Rightson v. Overton*, ib. 20, 2 Eq. Cas. Abr. 429, in marg.; *Thornborough v. Baker*, 3 Swanst. 628, 1 Ch. Cas. 283, 2 Freeman 143, 2 Eq. Cas. Abr. 428, cited 2 Freeman 227; *Noy v. Ellis*, 2 Ch. Cas. 220; *Noy v. Besustane & Ellis*, S. C., Cas. T. Finch, 305; *Turner's case*, 2 Ventr. 348.

(h) *Winn v. Littleton*, or *Littleton's case*, 1 Vern. 3, 2 Ventr. 351; *Canning v. Hicks*, 1 Vern. 412. See also *Austen v. Executors of Dodwell*, 1 Eq. Cas. Abr. 318, Ca. 9.

When the executor of a mortgagee in fee is entitled to the money due on the mortgage, he may oblige the mortgagee's heir at law, if in possession of the land, to give that possession up ^{*}to him; and, whether in or out of possession, to convey to him the fee- [*194] simple.(i)

The case of *Stewkley v. Henley* seems to be an authority, that if the land and mortgage-money are, by the mortgagee's will, given to A. and his heirs, in trust for B. and his heirs, and B. dies, and the mortgage is redeemed, the money will be payable to B.'s executor, and not to his heir.(j)

It is, however, in the power of a mortgagee in fee, to make the pledge and money follow in equity the course, which the land takes at law, and, in this sense, to make real estate of the pledge,(k) which, without this conversion, is, in equity, personal estate.(l) Such conversion may be effected by the mortgagee's will, wherein he expresses that intention in a devise of the land.(m) And a will, that makes the pledge real estate, may have the effect, amongst others,(n) to entitle the devisee's heir at law, to whom at law the land is descended, to the possession of the land, and also the money secured by it.(o) But it seems such conversion by the will of the mortgagee is not allowed to the extent, to withdraw the pledge and money from the personal estate of the testator, if there is a deficiency of his assets for the payment of his debts.(p)

It may farther here be noticed, that on a purchase from a mortgagee in fee, the purchaser may make the pledge to be in equity his real estate, and by this means confer on his heir at law the benefit of the purchase. In *Cotton v. Iles*, a purchase was construed to have this effect.(q)

(i) *Ellis v. Gnavas*, 2 Ch. Cas. 50; Lord Gorge v. Dillington, 1 Ch. Rep. 279, cited 3 Swanst. 633; *Tabor v. Grover*, 2 Freem. 227, 2 Vern. 367; *Wood v. Nosworthy*, cited 2 Vern. 193. See *Turner v. Crane*, 2 Ch. Rep. 242, 1 Vern. 170.

(j) 2 Ch. Rep. 166.

(k) *Thornborough v. Baker*, 1 Ch. Cas. 283, 286, 2 Freem. 145; *Martin v. Mowlin*, 2 Burr. 969, 978.

(l) 1 Ch. Cas. 286; 2 Burr. 978. See *Fisk v. Fisk*, Prec. Ch. 11.

(m) *Doe v. Parratt*, 6 Durn. & E. 652.

(n) *Garret v. Evers*, Mos. 364.

(o) *Noys v. Mordaunt*, 2 Vern. 581, Prec. Ch. 265.

(p) *Garret v. Evers*, Mos. 364.

(q) 1 Vern. 271.

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*CHAPTER XIII.

OF HEIR-LOOMS, AND CERTAIN OTHER CHATTELS.

SECT. I. *Of Heir-looms.*II. *Of certain other Chattels.*

SECTION I.

OF HEIR-LOOMS.

AN heir-loom seems to be a personal chattel, which so belongs to an estate of inheritance, that, by the particular custom of the place where the estate is situate, it is descendible with it to the heir at law. Sir Henry Spelman defines it, "omne utensile robustius quod ab ædibus non facile revellitur, ideoque ex more quorundam locorum ad hæredem transit tanquam membrum hæreditatis: nam *heier* Sax. hæres: *leoma*, membrum." (a) "In some places," says Sir Edward Coke, "chattels as heir-loomes (as the best bed, table, pot, can, cart, and other dead chattels moveable) may go to the heir; and the heir in that case may have an action for them at the common law, and shall not sue for them in the Ecclesiastical Court; but the heir-loome is due by custom, and not by the common law. An heir-looms is called *principalium*, or *hæreditarium*." (b) And although heir-looms may generally be "such [*196] things as cannot be taken away without *damaging or dismembering the freehold," (c) yet Sir E. Coke and Sir W. Blackstone both are authorities, that a personal chattel, which is not annexed to the freehold, as a cart, or household utensil or implement, may also be an heir-loom. (d) In an action of trover for a chain of pearl, it was, by Holt, C. J., ruled at *Nisi Prius*, that "a jewel cannot be an heir-loom, but only things ponderous, as carts, tables, &c." (e)

(a) Spelman Gloss. v. *Heier-looms*.

(b) Co. Litt. 18 b. To the same effect, see Bro. Abr. tit. *Customs*, 27, tit. *Discent*, 43, and 1 Rol. Abr. 625, E. 3. An heir-loom may not only be, the *best* bed, table, or the like, an expression which supposes some other chattel of the same kind, and appears to admit that the heir-loom may be a chattel, newly acquired by the owner of the estate; but it may be a particular chattel, that has seen several descents. "Heir-loome is any piece of household stuff (*ascun parcel des utensils d'un 'mease*), which, by the custom of some countries, having belonged to a house for certain descents, goes with the house (after the death of the owner) to the heir, and not to the executors." *Termes de la Ley*, v. *Heir-loome*.

(c) Spelman Gloss. v. *Heier-looms*; 2 Bl. Com. 427.

(d) Co. Litt. 18 b.; 2 Bl. Com. 428.

(e) Lord Petre v. Heneage, 1 Ld. Raym. 728. In another report of the same case, the learned judge expressed an opinion, that "goods in gross cannot be an heir-loom, but they must be things fixed to the freehold, as old benches, tables, &c." (12 Mod. 519). This certainly was an observation directly pertinent to the case before the Court; but here it may be noticed that, with reference to the *obiter dicta* of the same learned person, Lord Chief Justice Willes has said, that, in many cases, they were "*nunquam dicta*, but barely the words of the reporters; for, upon examination, I have found many of the sayings ascribed to that great man, Lord Chief Justice Holt, were never said by him." 1 Ves. jun. 13.

Heir-looms may be sold, or otherwise disposed of, by the ancestor, in his life-time, and like timber, even separately from the estate to which they belong.^(f) But, separately from the estate, he cannot dispose of them by his will.^(g) "If a man," says Sir E. Coke, "be seised of a house, and possessed of divers heir-looms, that by custom have gone with the house from heir to heir, and by his will deviseth away the heir-looms, this devise is void; for the will taketh effect after his death, and by his death the heir-looms, by ancient custom, are vested in the heir, and the law preferreth the custom before the devise."^(h) If the estate is devised away from the heir, and the heir-loom is some "utensile robustius quod ab ædibus non facile revellitur," some chattel, which "cannot be taken away, without damaging or dismembering the freehold;" in this case, it is presumed such heir-loom will, with the estate, pass to the devisee.⁽ⁱ⁾ But if the heir-loom is some best chattel, not fixed to the freehold, as the best cart, or pot, or can, or other household utensil or implement, then, perhaps, this chattel will not, where there is such devise, belong either to the devisee, or to the heir, but will, as personal property, go to the testator's executor or administrator.

*On bequeathing personal chattels, as plate, pictures, books, [*197] or household furniture, the testator frequently directs that they shall, in the nature of heir-looms, accompany the descent or devolution of a particular real estate, devised, or previously settled. Such a bequest, although it will not make these chattels heir-looms, will impress them with so much of their nature, that they will be capable of following the course of descent or limitation of real property. But an adult tenant, either in fee or in tail, of the real estate, the course of descent or limitation of which such chattels are to follow, may sell or otherwise alien them in his life-time; and, what distinguishes this kind of property from real heir-looms, may dispose of them, without the estate, by his will. A person possessed of personal chattels, under a bequest, by which, if it was a limitation of real estate, he would be seised either in fee-simple or fee-tail, possesses the whole and absolute interest in them;^(j) and, as personal property is not a subject of descent,^(k) they will, if not before disposed of by him, devolve at his death to his personal representative, executor or administrator.^(l) And they will so devolve, and his interest in them will be the same, notwithstanding a direction in the will, that they shall be deemed and taken as heir-looms.^(m)

When personal chattels are bequeathed to accompany limitations, or a devise, in strict settlement of real estate, and are directed to be deemed and taken as heir-looms, an infant tenant in tail in possession of the real estate will be possessed of the whole interest in the chattels,⁽ⁿ⁾ unless there are additional expressions in the bequest, which prevent their vesting in such tenant in tail during his minority.^(o) When vested in the infant, they cease to follow the limitations of the real estate; at the age

(f) 2 Bl. Com. 429.

(g) Co. Litt. 185 b.; 1 P. W. 730; 2 Bl. Com. 429.

(h) Co. Litt. 185 b.

(i) See Amos & Fer. on Fict. 167.

(j) Ded v. Dickenson, 8 Vin. Abr. 451, 2 Eq. Cas. Abr. 335; Richards v. Lady Bergham, 2 Vern. 324.

(k) Co. Litt. 388 a.; 2 Bro. C. C. 578.

(l) Co. Litt. 388 a.

(m) Duke of Bridgewater v. Littleton, 1 Bro. C. C. 280, n.

(n) Duke of Bridgewater v. Littleton, 1 Bro. C. C. 280, n.; Bland v. Bland, 2 Cox, 349; Warter v. Hutchinson, 2 Brod. & B. 349, 5 J. B. Moore, 143; Lord Deerhurst v. Duke of St. Albans, 5 Madd. 232.

(o) Trafford v. Trafford, 3 Atk. 347.

[*198] of fourteen he may dispose of them by his will; (p) and in the event of his *death at any age during his minority, they will, if undisposed of by him, belong to his personal representatives. (g)

SECTION II.

OF CERTAIN OTHER CHATTELS.

AN heir at law, to whom land is descended in fee, is, to the exclusion of his ancestor's executor or administrator, entitled to the following kinds of chattels personal, which, as "profits of the freehold," (r) or, "necessary to the well-being of the inheritance," (s) belonged to such ancestor at the time of his death; namely, deer in a park, (t)

[*199] that is, in a "real authorized" (u) *park; conies in a war-

(p) 12 Ves. 229.

(g) Duke of Bridgewater v. Littleton, 1 Bro. C. C. 180, n.; Foley v. Burnell, 1 Bro. C. C. 274, 4 Bro. P. C. ed. Toml. 319; Vaughan v. Burslem, 3 Bro. C. C. 101; Carr v. Lord Errol, 14 Ves. 478, also stated 5 Madd. 253.

(r) Cro. Eliz. 373.

(s) 2 Bl. Com. 428.

(t) Co. Litt. 8 a.; 1 Rol. Abr. 916, Z. 2; Wentw. Off. Ex. ch. 5, 14th ed. p. 127; God. Orph. Leg. part 2, ch. 14. Without the deer, "the park, which is an inheritance, is not complete." 7 Co. 17 b.

(u) 2 Bl. Com. 427; 7 Co. 17 b. Sir E. Coke says,—“It is not lawful for any man to erect a park, without a license under the great seal of the king.” And to be a lawful park, he observes, “three things are required: 1. A liberty, either by grant, as is aforesaid, or by prescription; 2. Inclosure by pale, wall, or hedge; and 3. Beasts savages of the park.” (2 Inst. 199). And, to the same effect, he in another place states,—“In law, a park “signifieth a great quantity of ground inclosed, privileged for wild beasts of chase by prescription, or by the king’s grant.” (1 Inst. or Co. Litt. 233). A similar definition is given in the *Termes de la Ley* v. Park. And Sir W. Blackstone says,—“A park is an enclosed chase, extending only over a man’s own grounds. The word park, indeed, properly signifies an enclosure; but yet it is not every field or common, which a gentleman pleases to surround with a wall, or paling, and to stock with a herd of deer, that is thereby constituted a legal park; for the king’s grant, or at least immemorial prescription, is necessary to make it so.” (2 Bl. Com. 38). A park by grant, or prescription, Sir E. Coke calls a lawful (2 Inst. 199) park, or park in law, (3 Inst. 76). A park “erected

without lawful warrant,” he terms a nominative (2 Inst. 199) park, or a park in use or reputation. (3 Inst. 76). And Sir M. Hale distinguishes between a “legal park,” and “a bare park in reputation;” and says, “If a man enclose a piece of ground, and put deer in it, this makes it not a park, without a prescription time out of mind, or the king’s charter.” (1 Hist. Pl. Cr. 491). of an ancient park, or park by prescription, see *Witthens v. Ischam*, 1 Dyer, 70 a., and *The King v. Byron*, Bridgm. Rep. 33, *Manwood Fer. L. ch. 3*, ed. 1665, p. 84. In pleading, if a close is stiled a certain close called a park, as C. Park; or if it is stiled a park, called C. Park; and it is not said that it is a park, either by grant or prescription, a Court of Law cannot take it to be so. (*Davies v. Powell*, *Willes*, 46, 50; *Mallocke v. Eastly*, 3 Lev. 227. See also *Anon. Keilw.* 202 b.) And, farther, on a park, see 11 Co. 86 a., 87 b.; *Keilw.* 203 a., 3 Rol. Abr. 33; *Manwood Fer. L. ch. I*, ed. 1665, p. 52. “At Woodstock,” says Camden, “is a magnificent palace built by Henry I. Henry I. also adjoined to the palace a large park, inclosed with a wall of stone, which John Rous affirms to have been the first park in England; though we meet with these words, *Parca sylvestris bestiarum*, more than once in *Domesday-Book*. But afterwards they increased to so great a number, that there were computed more in England, than in all the Christian world besides.” (1 *Camd. Brit.* 397). Henry I., it appears, inclosed Woodstock Park, “not for deer, but all foreign wild beasts, such as lions, leopards, camels, lynxes, which he procured abroad of other princes.” (*Plot’s Nat. Hist. of Oxfordshire*, 2nd ed. p. 357; *Spelm. Gloss. v. Parcus*). A writer on the county of Northamptonshire says,—“Though some of the Northamptonshire parks, and

ren;(v) doves, or pigeons, in a dove-house,(w) young and old;(x) fish in a pond,(y) as "carps, breames, tenches, &c.," bought by the ancestor, and put into his pond for store.(z) And the heir is, it may here be added, entitled to timber, and fruit, or other trees growing; [*200] to fruit "on trees; and to grass growing, or, as it is other- wise expressed, growing for hay, or grass ready to be cut down.(a) And having mentioned certain animals, to which an heir at law is entitled on the death of his ancestor, it may be of some use farther to state, that they constitute exceptions to the general law, which gives to the personal representative, executor, or administrator, of a person deceased, all his personal property;(b) and, under which general law, the executor or administrator is entitled, it may in particular be noticed, to the following kinds of property of the person deceased; namely, his tame deer, conies, pigeons, pheasants, partridges; "so, though not tame, if they were taken, and kept alive in any room, cage, or like receptacle, as pheasants and partridges often be;"(c) also his fish in a trunk:(d) and his horses, kine, bullocks, sheep, swine, and cattle of all kinds; his geese, ducks, poultry, &c.:(e) and it is manifest that the author of "The Office and Duty of Executors" inclined to the opinion, that the personal representative is moreover entitled to the hounds, greyhounds, and spaniels,

particularly some of those that bear that name in the older maps of the county, are now disused, and retain only the name, yet the number is rather enlarged than diminished, many other places having lately been imparked, and very finely stocked with deer." (Morton's Nat. Hist. of Northamptonshire, ed. 1712, p. 12). The same observation may, perhaps, be applied to most other counties in England; and such recent inclosures are, it is probable, parks in reputation only, and not legal parks. In Burton's Description of Leicestershire (ed. 1622, p. 6), are enumerated several parks in that county; and, among others, "Kirby Park, imparked by William, first Lord Hastings, 14 Edward IV., now the inheritance of Sir Henry Hastings. Bagworth Park, imparked by William Lord Hastings, 14 Edward IV., now the inheritance of Sir Robert Banaster, Knight." The same author also mentions a park "imparked by William Lord Hastings, by license of King Edward IV., 14 Edw. IV." And of parks disparked, he names "Houlst Park, imparked by Thomas Palmer, Esq., by license granted 26 Henry VI." Madox, in his History of the Exchequer, enumerates the fines paid for a great variety of licenses granted by the Crown; and, among others, he mentions that, "Peter de Geldinton gave one Hawk, for leave to enclose certain land, part of his wood of Stokes, to make a park of it," (p. 326). And it there also appears that, to make a park, a license was granted to enclose a wood in the manor of Coggeshal, probably in Essex (p. 260, n. (y)). Other fines for enclosures are mentioned in the same work, p. 279, n. (n), and p. 353.

(v) Co. Litt. 8 a.; Wentw. Off. Ex. ch. 5; God. Orph. Leg. part 2, ch. 14.

(w) Co. Litt. 8 a.; Wentw. Off. Ex. ch. 5; Swinb. on Wills, part 6, s. 7, 5th ed. p. 403; God. Orph. Leg. part 2, ch. 14, part 3, ch. 21.

(x) Co. Litt. 8 a. The author of "The Office and Duty of Executors" says, that the executor, and not the heir, is entitled to "young pigeons, though not tame, being in the dove-house, not able to fly out; yet their dams, the old ones, shall go to the heir with the dove-house." Wentw. Off. Ex. ch. 5, 14th ed. p. 143.

(y) Wentw. Off. Ex. ch. 5; Swinb. on Wills, part 6, s. 7; God. Orph. Leg. part 2, ch. 14; Parlet v. Cray, Cro. Eliz. 372; Gray v. Trowe, Gouldsb. 129; Grey's case, or Grey 7. Bartholomew, Owen, 20. See also Anon. Keilw. 118 a.

(z) Gray v. Pawlett, or Paulet, 1 Rol. Abr. 916, Z. 1, Co. Litt. 8 a.

(a) Swinb. on Wills, part 3, s. 6, part 7, s. 10, 5th ed. p. 176, 478, 479; God. Orph. Leg. part 2, ch. 13, and ch. 14, 2nd ed. p. 122, 126; Wentw. Off. Ex. ch. 5, 14th ed. p. 145, 146. On trees, as lemon-trees, in boxes, see Oliviere v. Vernon, 6 Mod. 170.

(b) Co. Litt. 388 a.; Wentw. Off. Ex. ch. 5.

(c) Wentw. Off. Ex. ch. 5, 14th ed. p. 143; God. Orph. Leg. pt. 2, ch. 13, 2nd ed. p. 122.

(d) Wentw. Off. Ex. ch. 5; Co. Litt. 8 a. See also 6 Mod. 183.

(e) Wentw. Off. Ex. ch. 5, 14th ed. p. 138; God. Orph. Leg. pt. 2, ch. 13, 2nd ed. p. 122.

which belonged to the deceased;(f) and this opinion agrees, it is probable, with the present law on the subject;(g) notwithstanding it may be true that hounds, being *feræ naturæ*, are not, for all purposes, either goods or chattels,(h) and will not pass under a grant or bequest of "goods and chattels"(i) and although Swinburne and Noy appear to have thought, that the hounds of a person deceased devolve to his heir, and not to his executor or administrator."(j)

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*CHAPTER XIV.

OF CONVERSION BY WILL OF REAL ESTATE INTO PERSONAL, AND
OF PERSONAL INTO REAL ESTATE.SECT. I. *Of Conversion of Real into Personal Estate.*II. *Of Conversion of Personal into Real Estate.*

SECTION I.

OF CONVERSION OF REAL INTO PERSONAL ESTATE.

1. *Conversion for a limited purpose only.*—2. *Conversion for all the purposes of the will; the testator creating a trust to sell real estate, and meaning to dispose of the whole produce of the sale, but to dispose of it as property distinct from his general personal estate.*—3. *Conversion for all the purposes of the will; the testator creating a trust to sell real estate, and meaning to dispose of the whole produce of the sale, and to dispose of it, as, for the purposes of his will, a part of his general personal estate.*—4. *Conversion, out and out.*—5. *Of the quality, real or personal, of the interest, that, under a trust for sale, results to the testator's heir at law.*

1. When a will creates a trust to sell real estate, the testator's object sometimes is, to cause a conversion for a limited purpose only; as to pay debts, or legacies, or both debts and legacies.(a) Where a will has created a trust to sell real estate, for the limited purpose to pay debts, the testator's heir at law has been held to take, by resulting trust, the surplus of the money raised by the sale, after the debts paid.(b)

(f) Wentw. Off. Ex. ch. 5, 14th ed. p. 143.

(g) 4 Burn. Eccl. L. 7th ed. 297; Amos & Fer. on Fict. 169.

(h) Swinb. on Wills, pt. 7, s. 10, 5th ed. p. 476, 480.

(i) Noy's Max. 50, 101, 9th ed. 144, 230, and arg. Cro. Eliz. 126, Owen, 94.

(j) Swinb. on Wills, pt. 7, s. 10, 5th ed. 480; Noy's Max. 50, 9th ed. 144. In *Ireland v. Higgins, Owen*, 93, it is said by counsel in arg., that dogs are not assets.

(a) *Dixon v. Dawson*, 2 Sim. & St. 327.

(b) *Gale v. Crofts*, 4 Vin. Abr. 468, 2 Eq. Cas. Abr. 494. See *Kinaston v. Kinaston*, 2 Dick. 506; and, farther, 16 Ves. 191.

*Where a will has created a trust to sell real estate, for the limited purpose to pay legacies, the testator's heir at law has [*202] been held to take, by resulting trust,—the surplus of the money produced by the sale, after payment of the legacies:(c) the whole money arising from a sale of real estate, in a case where a testator gave all the residue of his real and personal estate, in trust to be sold, and the produce of the sale of the real estate was not required for the purposes of the trust:(d) the whole real estate, no part of which was sold, the purposes of the will being all satisfied, without having recourse to it:(e) the whole real estate, in a case where the only disposition of the produce of the sale was of the interest of it for the life of a person, and the estate was not sold in her life-time:(f) 1000*l.* bequeathed to the executor, “to be disposed of according to any instructions the testator might leave in writing;” no instructions as to that sum being found after the testator's death.(g)

In *Hill v. Cock*, where real estate was devised to trustees, in trust to sell for the particular purpose, “in the first place, to reimburse themselves all reasonable expenses, which they should be put to in or about the execution of the will, or the trust thereby in them reposed;” and the will did not afterwards express any ulterior purpose; the testator's heir at law was held to take, by resulting trust, the money arising from the sale of the real estate, which it was not necessary to apply for the only purpose expressed in the will.(h)

And where a will has created a trust to sell real estate, for the limited purpose to pay debts and legacies, the testator's heir at law has been held to take, by resulting trust,—the surplus of the money produced by the sale, after payment of debts and legacies:(i) the *whole real [*303] estate; no part of which was sold, the purposes of the will being all satisfied, without having recourse to it.(j)

2. When a will creates a trust to sell real estate, the testator's object sometimes is, to cause a conversion for all the purposes of the will; meaning to dispose of the whole produce of the sale, but to dispose of it as property distinct from his general personal estate.(k)

Where a will has contained this intention, the effect of the conversion has been,—to entitle a widow to a moiety of her husband's share, bequeathed to him of the money to arise by the sale:(l) to entitle to the estate to be sold the next of kin of the legatee of the whole produce of the sale; in a case, where the property had not been sold, and the legatee, who was a lunatic, had been incompetent to elect to take the estate as land.(m)

(c) *Stonehouse v. Evelyn*, 3 P. W. 252; *Randall v. Bookey*, 2 Vern. 425, Prec. Ch. 162; *City of London v. Garway*, 2 Vern. 571; *Berry v. Usher*, 11 Ves. 87.

(d) *Robinson v. Taylor*, 2 Bro. C. C. 589, 1 Ves. jun. 44.

(e) *Chitty v. Parker*, 2 Ves. jun. 127, 4 Bro. C. C. 411; *Maugham v. Mason*, 1 Ves. & B. 410.

(f) *Wilson v. Major*, 11 Ves. 205.

(g) *Collins v. Wakeman*, 2 Ves. jun. 683, cited 18 Ves. 166.

(h) 1 Ves. & B. 173.

(i) *Starkey v. Brooks*, 1 P. W. 390.

(j) *Buggins v. Yates*, 9 Mod. 122.

(k) *Davers v. Folkes*, 1 Eq. Cas. Abr. 396, Ca. 9; *Smith v. Claxton*, 4 Madd. 484. on the second and third devises; *Jones v. Mitchell*, 1 Sim. & St. 390.

(l) *Doughty v. Bull*, 2 P. W. 320.

(m) *Ashby v. Palmer*, 1 Mer. 296. In this report of the case, some material words contained in the will are omitted. The following statement of the will is extracted from the Reg. B.—“E. F. gave and devised to W. F. and M. P., and to their heirs, &c., all her real and personal estate, in trust to sell as soon [as] conveniently they could after her decease; and out of the money thereby raised, and with the rents, issues, and profits

In other cases, the effect of the conversion has been, to entitle the testator's heir at law to take, by resulting trust,—a legacy lapsed, after the testator's decease, by the death of the legatee before it vested in him: (n) five-sixth parts of the produce of the sale of the real estate, such parts being bequeathed by a residuary clause in the will, and having lapsed, after [*204] the testator's *decease, by the death of the legatee before they vested in him: (o) a legacy lapsed by the death of the legatee in the testatrix's lifetime: (p) a residuary legacy lapsed by the death of the legatee in the testator's life-time: (q) a residuary legacy bequeathed by the will, and lapsed by the death of the legatee in the testator's life-time; in a case, where such legacy was held not to pass by a codicil attested by two witnesses only: (r) a rent-charge bequeathed to charitable uses, and void under the statute 9 George II. c. 36: (s) legacies bequeathed to charitable uses, and void under the same statute. (t)

3. When a will creates a trust to sell real estate, the testator's object sometimes is, to cause a conversion for all the purposes of the will; meaning to dispose of the whole produce of the sale, and to dispose of it as, for the purposes of his will, a part of his general personal estate. (u)

Where a will has contained this intention, the effect of the conversion has been,—that the surplus produce of the sale, after payment of debts and legacies, passed to the residuary legatee under a bequest of "all the rest and residue of my personal estate": (v) that a legacy given to charitable uses, and void under the statute 9 George II. c. 36, passed to the residuary legatee of "personal estate": (w) to entitle to the real estate, as money, the personal representatives of the sole next of kin of the legatee,

of her real estate until sale, in the first place to pay and discharge all the debts of her late husband, deceased, her own debts and funeral expenses; and with the surplus thereof bring up, maintain and educate her daughter E., in such manner as they should think most for her advantage until she attained twenty-one years, or should be married, which should first happen, and then to pay all such money, as should remain in their hands undisposed of for the uses aforesaid, unto her said daughter. But if her said daughter died unmarried before attaining twenty-one years, such monies, remaining unapplied to her use, were to be for the use and benefit of the said M. P., her heirs, executors, administrators, and assigns, to whom she gave and bequeathed the same."—Reg. B. 1815, A. 1111 b. See S. C., stated from MS., 2 Jarm. on Dev. 64. And on a devise of land, in the quality of land or money, see, farther, 4 Madd. Rep. 492.

(n) *Cruise v. Barley*, 3 P. W. 20.

(o) *Spink v. Lewis*, 3 Bro. C. C. 355.

(p) *Hutcheon v. Hammond*, 3 Bro. C. C. 128, cited 4 Ves. 810.

(q) *Digby v. Legard*, 2 Dick. 500, 3 P. W. 5th ed. 23, n., and also stated 1 Bro. C. C. 501; *Ackroyd, or Akeroid, v. Smithson*, 1 Bro. C. C. 503, 3 P. W. 5th ed. 23, n., cited 18 Ves. 165, and 1 Ves. & B. 417; *Nicholls v. Crisp*, stated 4 Ves. 65; and on,

in seems, another point reported in *Ambl. 769*; *Williams v. Coade*, 10 Ves. 500. In the last case, the Court considered it to be clear, that the rents and profits until the sale were personal estate.

(r) *Hooper v. Goodwin*, 18 Ves. 156.

(s) *Gravenor v. Hallum*, *Amb. 643*.

(t) *Gibbs v. Rumsey*, 2 Ves. & B. 294. See *Kennell v. Abbott*, 4 Ves. 810, 811; and *Barrington v. Harris*, there cited.

(u) *Wright v. Wright*, 16 Ves. 188; *Smith v. Claxton*, 4 Madd. 484, on the first devise; *Vauchamp v. Bell*, 6 Madd. 343.—See also *Brown v. Bigg*, 7 Ves. 279; and farther, *Yates v. Compton*, 2 P. W. 308; *Lord Bristol v. Hungerford*, *Proc. Ch. 81*, 3 P. W. 194, n. C.; *Flanagan v. Flanagan*, cited 1 Bro. C. C. 500, and 2 Ves. jun. 77, 176; and *Burton v. Hodsoll*, 2 Sim. 24.

(v) *Mallabar v. Mallabar*, *Cas. T. Talb. 78*, cited 3 Bro. C. C. 143, and in *Mr. Scott's* (Lord Eldon's) argument in *Ackroyd v. Smithson*, 1 Bro. C. C. 508, 509. See also 8 Ves. 495, 496.

(w) *Durour v. Motteux*, 1 Ves. 320, cited 1 Bro. C. C. 500, 3 Bro. C. C. 143, 1 Ves. and B. 417, 1 Sim. and St. 294, and in *Mr. Scott's* argument in *Ackroyd v. Smithson*, 1 Bro. C. C. 510. And see the will in *Durour v. Motteux*, stated from Reg. B., 1 Sim. & St. 292, n.

to *whom the money to arise by the sale was bequeathed:(x) [*205] to entitle a residuary legatee to a legacy, bequeathed out of the produce of the sale of the real estate, and which legacy failed, because it was given to a person under a particular character, which he had falsely assumed, and which alone could be supposed the motive of the testatrix's bounty:(y) to entitle a residuary legatee to legacies, lapsed by the death of the legatees in the testatrix's life-time:(z) to entitle the trustee, or devisee of the estate to be sold, to the surplus land, or produce of the sale, after the other purposes of the will were satisfied.(a)

In *Sheddon v. Goodrich*, where, it seems, a will contained a like intention of conversion and disposition, and where legacies were bequeathed out of the money to arise by the sale, and the surplus produce was, by a residuary clause, given to the testator's heir at law; it appears to be decided, that this residuary bequest was not revoked by a second will, or a codicil, attested by two witnesses only. And in this case Lord Eldon seems to have expressed an opinion, that if a will, attested by three witnesses, converts real estate out and out into personalty; the testator intending the property to be considered as if it had, in his life-time, existed as personal estate; he cannot, after making such will, dispose of the produce of the sale, by a codicil which is not attested by three witnesses.(b)

In *Gibbs v. Ougier*, where a will converted real estate into money, which, for the purposes of the will, the testator meant to be taken as part of his general personal estate, it appears to have been decided, that the real estate was not liable to pay the simple contract debts of the testator, except by means of the equitable doctrine of marshalling the assets.(c)

4. When a will creates a trust to sell real estate, the testator's *object in causing the conversion sometimes is, so to im- [*206] press the real estate with the quality of money, that, after the testator's death, it shall be taken to have existed as money previously to his death, and therefore be considered as, to all intents, and for all purposes, part of his general personal estate. And where this intention appears in the will, the real estate is said to be converted out and out into personalty.(d)

A conversion of this kind seems to take place in *Lord Bristol v. Hungerford*, where a person devised lands, in trust to be sold for the payment of his debts and legacies, and willed that the surplus should be deemed part of his personal estate, and go to his executors; to each of whom he gave a legacy of 100*l.* And in which case the words of the decree made by the Master of the Rolls are,—“And as to the surplus of the said estate, after the debts and legacies paid, his Honor declared, that the testator having given to each of his executors 100*l.*, there is a resulting trust in them for the benefit of the representatives of the said testator; and that the defendants, Mrs. R. and Mrs. M., who were co-heirs and representatives of the said testator, Sir W. B., were well entitled thereto; and doth therefore decree, that the residue and surplus of Sir W. B.'s estate, his

(x) *Fletcher v. Ashburner*, 1 Bro. C. C. 497.

(y) *Kennell v. Abbott*, 4 Ves. 802.

(z) *Amphett v. Parke*, 1 Sim. 275.

(a) *North v. Crompton*, 1 Ch. Cas. 196, cited 2 Vern. 253, 1 Bro. C. C. 89, and 1 Ball & B. 543; *Conningham, or Cunningham, v. Mellish*, Prec. Ch. 31, 2 Vern. 247,

and 3d ed. n. 5; *Rogers v. Rogers*, Cas. T. Talb. 268, 3 P. W. 193. See also *Cook v. Duckenfield*, 2 Atk. 562, 567.

(b) 8 Ves. 481.

(c) 12 Ves. 413.

(d) 2 Bro. C. C. 595; 8 Ves. 495, 496; 11 Ves. 91; 19 Ves. 427; 1 Ves. & B. 175; 6 Madd. 347, 348.

debts and legacies being paid as aforesaid, be equally distributed between them.”(e)

If a will converts real estate out and out into personalty, it would seem that this estate, or the money to arise by the sale, is, independently of the doctrine of marshalling assets, liable to pay the simple contract debts of the testator, although the will makes no provision for debts, as either by a direction to sell for payment of debts, or by a charge of debts.(f)

[*207] 5. When, by a will, a chattel estate until a person is of age *is, for a particular purpose, created out of the inheritance of land, and the inheritance is devised by the will, but, for want of disposition, after the particular purpose satisfied, a trust of the chattel estate results for the testator's heir at law; here, the heir takes this trust, not as real, but as personal estate. And, accordingly, after the death of the heir, a decree has been made for his administrator, and not for his heir.(g) And, in the like case, a trust would also, it appears, result, as personal estate, if it were the trust of a term of years, created out of the inheritance devised by the will. “In case it had been a term absolutely raised out of the inheritance, yet being raised for a particular purpose, which is satisfied, the heir should have the benefit of the surplus of the term. But now, though the heir is favoured thus to have the surplus of a term, that is carved out of the inheritance for a particular purpose, yet he must have it as a term, which must go in a course of administration, and not in a course of descent.”(h) In *Hewitt v. Wright*, a deed created a trust to sell real estate for the payment of debts, and to raise 1500*l.*, for a specified purpose. The real estate was sold; and after the specified purpose of raising the 1500*l.* was satisfied, as the deed contained no farther disposition of that sum, a trust of it was held to result, as personalty, to the grantor; and therefore to pass under his will. In making this decision, Lord Thurlow observed, that it was established, “that where a real estate is directed, by a deed or will, to be sold, so much as the deed or will does not dispose of, results as land. This is settled by *Emblyn v. Freeman* [Prec. Ch. 541.] If it goes, in the case of a will, to the heir; in the case of a deed, it must result to the grantor. And though, in the case of the will, it cannot go to the executor as money, not having been converted, but must descend to the heir, yet he should think that it was personal estate of the heir; and, if he were dead, would go to his executor; and, if so, where it resulted to the grantor, it would be personalty in his hands, and would pass as such. And, therefore, although he thought the case of *Emblyn v. Freeman* right, that the conversion [*208] into money did not *prevent its resulting to the grantor, he could not help thinking, notwithstanding that case, that the trust of the 1500*l.* resulted here, in the same manner that it vested in W., the grantor, as personal estate, and so was disposed of by the general terms of the devise.”(i) In *Wright v. Wright*, where a will contained

(e) Prec. Ch. 81, 3 P. W. 194, n. [C.]; *Countess of Bristol v. Hungerford*, S. C., 2 Vern. 645; *Symmes v. Symonds*, S. C., 4 Bro. P. C. ed. Toml. 328.

(f) *Gibbs v. Ogier*, 12 Ves. 413. The observation of Lord Tenterden, that “It is quite clear, the testator cannot alter the legal character of the property, by directing that it shall be considered part of his personal es-

tate,” (*Barker v. May*, 9 Barn. & C. 494,) must, perhaps, be understood to apply merely to the particular circumstances, with reference to which it was made; and to mean that, by such a direction, a testator cannot convert equitable into legal assets.

(g) *Levet v. Needham*, 2 Vern. 138.

(h) *Ibid.* 139.

(i) 1 Bro. C. C. 86.

a trust to sell real estate, it was not necessary to determine whether the testator intended a conversion out and out; or intended to cause a conversion for all the purposes of his will, meaning to dispose of the whole produce of the sale, and to dispose of it, as, for the purposes of his will, a part of his general personal estate; because, in the events that had happened, the result, with respect to the rights of the parties, would be the same. But on the supposition that the will contained the latter intention, then, as one, namely the ulterior, purpose of the will failed, a trust resulted for the testator's only child, a daughter, and heiress at law. And this interest of the heir was held to result for her as personal estate; and therefore it was decided, that, to the exclusion of the heir at law of the daughter and testator, the daughter's mother was entitled to the money as her administratrix. (j) In *Smith v. Claxton*, a will contained a trust to sell real and personal estate, and, with the produce of the sale, to pay the testator's debts, and certain legacies, and in trust to pay the residue or surplus to the testator's wife. The wife died in the testator's life-time; and the debts and legacies were fully paid out of the personal estate. It was decided, that, as the testator's purpose of sale had no application to the events which had happened, the whole interest which, in consequence, fell to his heir, resulted to him as land, and, therefore, he being dead, belonged to his heir at law, and not to his personal representative. The same will contained a second devise of real estate, in trust for sale; the ultimate disposition of the produce being in trust for the testator's sons, J. and R. R. died in the testator's life-time. And under such ultimate disposition, the interest, namely, the moiety, which in consequence of the partial failure of the purpose of sale by the death of R., fell to the testator's heir, was held to result to him as personal estate, and therefore to belong to his personal representative. The same will [*209] contained a third devise of real estate, in trust for sale; the ultimate disposition of the produce being in trust for the testator's sons, T. and J. The testator died, leaving T. his heir at law. And he also being dead, it was decided that his interest, or moiety, was personal estate, and therefore belonged to his personal representative. (k) In *Jones v. Mitchell*, a will, which created a trust to sell real estate, disposed of the whole produce of the sale. And a part of the money being bequeathed to charitable uses, such bequest was void under the statute, 9 George II. c. 36. And the purpose of the will so partially failing, the sum given to the charity was held to result to the testatrix's heir at law, and to belong to his personal representatives. (l) In *Dixon v. Dawson*, a will contained a devise of real estate, in trust to sell for the payment of debts, and certain legacies; but did not dispose of the surplus money remaining after those payments. The testatrix died, leaving P. D. her heir at law. The trustees sold the estate, and P. D. afterwards died. And the surplus produce of the sale was held to belong to the personal representative of P. D.; Sir John Leach, who made this decision, saying, "Where the whole land is properly sold by the trustees, and there is only a partial disposi-

(j) 16 Ves. 188.

(k) 4 Madd. 484. In this case, Sir J. Leach said, that under both the last devises, T., the heir, might, by agreement with his brother J., have elected to take his interest as land. Ibid. 494. On election, see farther

Davers v. Folkes, 1 Eq. Cas. Abr. 396; *Fletcher v. Ashburner*, 1 Bro. Cr. C. 500; *Kirkman v. Miles*, 13 Ves. 338; and *Ashby v. Palmer*, 1 Mer. 296.

(l) 1 Sim. & St. 290.

tion of the produce of the sale, there the surplus belongs to the heir as money, and not as land."^(m)

In *Walter v. Maunde*, where, under a trust created by will to sell real estate, part of the estate had been sold by the trustees, the testator's next of kin, who, under the particular terms of the will were entitled to the property, were held to take, as personal estate, the produce of the estate sold, and, as real estate, such part of the estate as remained unsold.⁽ⁿ⁾

[*210] *To the case of *Smith v. Claxton*, before mentioned, Sir J. Leach applied, it may be useful here to notice, the following general principles, which he apprehended to be the true result of all the authorities.—“Where a deviser directs his real estate to be sold, and the produce to be applied to particular purposes, and those purposes partially fail, the heir at law is entitled to that part of the produce, which in the events is thus undisposed of. The heir at law is entitled to it, because the real estate was land at the deviser's death; and this part of the produce is an interest in that land not effectually devised, and which therefore descends to the heir. It is for this reason that the produce of an estate, which the deviser directs to be sold, can never be strictly part of his general personal estate. If a deviser directs such produce to be paid to his executors, and applied as part of his personal estate, the executors take it as devisees. Every person, taking an interest in the produce of land, directed to be sold, is in truth a devisee, and not a legatee. A deviser may give to his devisee either land, or the price of land, at his pleasure; and the devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the deviser. If it be the purpose of the testator to give land to the devisee, the land will descend to his heir; if it be the purpose of the deviser to give the price of land to the devisee, it will, like other money, be part of his personal estate. Under every will, when the question is, whether the devisee, or the heir, failing the devisee, takes an interest in land, as land or money, the true inquiry is, whether the deviser has expressed a purpose, that, in the events which have happened, the land shall be converted into money. Where a deviser directs his land to be sold, and the produce divided between A. and B., the obvious purpose of the testator is, that there shall be a sale for the convenience of division; and A. and B. take their several interests as money, and not land. So, if A. dies in the life-time of the deviser, and the heir stands in his place, the purpose of the deviser, that there shall be a sale for the convenience of division, still applies to the case; and the heir will take the share of A., as A. would have taken it—as money, and not land. But in the case put, let it be supposed that A. and B. both die in the life-time of *the deviser, and the whole interest in the land descends to the heir; the question would then be, whether the deviser can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the deviser being, that there should be a sale for the convenience of division between his devisees, that purpose could have no application

(m) 2 Sim. & St. 327. See 16 Ves. 191, and 19 Ves. 429.

(n) 19 Ves. 424, on appeal from the decree in *Cole v. Wade*, 16 Ves. 27.

to a case, in which the devisees wholly failed, and the heir would therefore take the whole interest as land.”(o)

SECTION II.

OF CONVERSION OF PERSONAL INTO REAL ESTATE.

A PRINCIPLE created by, and followed in, Courts of Equity is, that what ought to be done is, to many intents, considered as done.(p) This principle, applied to a bequest of money to be laid out in land, has the effect that, for many purposes, the money is, from the death of the testator,(q) converted into land.(r) Consequences of this conversion are,—that the benefit of the bequest will pass under the general words, “lands, tenements, and hereditaments,” contained in the will of a devisee in fee of the land to be bought:(s) that if the devisee in fee of the land to be bought, and who has not elected to consider the money as money, dies before the purchase, the benefit of the bequest will descend to the heir of the devisee, and will not pass to the devisee’s personal representatives:(t) that the land to be bought is not assets to satisfy the simple contract debts of a devisee in fee of the land, who dies before the purchase is made:(u) that if the devisee in fee of [*212] the land dies an infant, as an infant cannot elect to consider the money as money, the money will as land descend to his heir, and not pass under a bequest of personalty in his will:(v) that the husband of the devisee in tail, or in fee, of the land to be bought, may be entitled to be tenant by the curtesy, although the wife dies before the purchase is made:(w) and that if a legacy is bequeathed to A., to be paid at twenty-one, and is payable out of the land to be purchased, the legacy will sink into the land, if A. dies before the day of payment.(x)

The conversion of the money into land does not take place until the death of the testator, unless it is clearly his intention to make the will impress the money with the nature of land in his life-time; and, therefore, if this intention is wanting, words, which in his will are properly applicable to land only, will not extend to apply to the money bequeathed by him to be laid out in land.(y)

Under the principle mentioned, the money is not to all intents con-

(o) 4 Madd. 492.

(p) 1 W. Bl. Rep. 129.

(q) Lord S. Beaucherk v. Mead, 2 Atk. 167.

(r) Sperling v. Toll, 1 Ves. 70; Johnson v. Arnold, ib. 169; Lord S. Beaucherk v. Mead, 2 Atk. 167, 170; Pullen v. Ready, ib. 587, 590; Brent v. Tyndall, 3 Bro. C. C. ed. Belt, 101, n. (4); Perry v. Philips, 1 Ves. jun. 251.

(s) Rashleigh v. Masters, 3 Bro. C. C. 99, 1 Ves. jun. 201; Kendrick v. Kendrick, 3 Bro. C. C. ed. Belt, 99, n. (1); Guidot v. Guidot, 3 Atk. 254. See Brent v. Tyndall, 3 Bro. C. C. ed. Belt, 101, n. (4).

(t) Carr v. Ellison, 2 Dick. 796, 3 Bro. C. C. 56; Sendamors v. Scudamore, Prec. Ch. 543.

(u) Trelawney v. Booth, 2 Atk. 307.

(v) Earlom v. Saunders, Amb. 241; Carr v. Ellison, 2 Bro. C. C. 56.

(w) Sweetapple v. Bindon, 2 Vern. 536; Carr v. Ellison, 2 Dick. 796; Cunningham v. Moody, 1 Ves. 174, 176; Dodson v. Hay, 3 Bro. C. C. 404, 409.

(x) Harrison v. Naylor, 2 Cox, 247, 3 Bro. C. C. 108; Pullen v. Ready, 2 Atk. 587, 590; Attorney General v. Milner, 3 Atk. 112.

(y) Lord S. Beaucherk v. Mead, 2 Atk. 167.

verted into land, from the death of the testator.(z) At his death the money will, as personal estate, be subject to the payment of his debts.(a) A party entitled to the fee-simple of the land to be bought is, unless an infant,(b) at liberty to consider the money as either money or land;(c) and it will pass in his will under a bequest of personal estate, if there is either evidence in the will, or collateral(d) evidence, that he elected to consider the money as personalty.(e) And it will pass in his will under [*213] *a bequest of personal estate, if, at the time of his death, the money is in his own hands, "without any other use but for himself,"(f) and a contrary intention is neither apparent in his will, nor proved by collateral evidence.(g) Money bequeathed to be laid out in land is not land so far, that a fine may be levied of the money.(h) And the money is not land for this purpose, namely, to escheat to the Crown, under an ultimate limitation to the right heirs of the testator; where the will does not so wholly impress the money with the nature of land, as to leave, after the testator's death, no choice to consider it as land or money.(i)

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*CHAPTER XV.

OF THE STATUTES 3 AND 4 WILLIAM AND MARY, C. 14; 47 GEORGE III., ST. 2, C. 74; AND 11 GEORGE IV. AND 1 WILLIAM IV., C. 47.

SECT. I. *Statute 3 and 4 William & Mary, c. 14.*

II. *Statute 47 George III., st. 2, c. 64.*

III. *Statute 11 George IV. and 1 William IV., c. 47.*

SECTION I.

STATUTE 3 AND 4 WILLIAM AND MARY, C. 14.

FREEHOLD land of inheritance, descended to a person's heir at law, is, by the common law, assets for the payment of the ancestor's debts by specialty, as by bond or covenant, in which his heirs are bound.(a) But, by the common law, the ancestor might deprive his creditors of this fund for their payment, by disposing of the land by his will; for, if he

(z) 1 W. Bl. Rep. 129. See *Abbott v. Lee*, 2 Vern. 284.

(a) *Lord S. Beaucherk v. Mead*, 2 Atk. 167, 170.

(b) *Earlom v. Saunders*, Amb. 241; *Carr v. Ellison*, 2 Bro. C. C. 56.

(c) *Bradish v. Gee*, Amb. 229; *Trafford v. Boehm*, 3 Atk. 440, 447.

(d) Amb. 229; 1 Bro. C. C. 236, 238.

(e) *Earlom v. Saunders*, Amb. 241, 242.

(f) 1 Bro. C. C. 238.

(g) *Pulteney v. Earl of Darlington*, 1 Bro. C. C. 223, 7 Bro. P. C. ed. Toml. 530, cited 2 Ves. jun. 175, and 3 Ves. 529.

(h) 1 P. W. 130; 2 P. W. 174; *Cruise on Fines*, 66.

(i) *Walker v. Denne*, 2 Ves. jun. 170, 185.

(a) 1 Stra. 665; 4 East, 492.

devised it, the devisee was, in equity, (b) as well as at law, entitled to hold the land free from the claims of the testator's creditors. (c) Also, by the common law, the heir at law, to whom the land descended, might, at law, frustrate the creditors of his ancestor, by selling or aliening the land before the creditors sued him; (d) although, in equity, it appears he was responsible for the value of the land aliened. (e)

This state of the law has been considerably altered by the following statute, 3 and 4 William and Mary, c. 14, made perpetual by 6 and 7 William III., c. 14. Amongst other provisions, "it renders [*215] land devised liable to the testator's debts by specialty, in which his heirs are bound; and, in cases where the land has descended, makes the heir at law liable to an action, although he has sold or aliened the property, before his ancestor's creditors have brought an action against him.

It recites and enacts as follows:—

Whereas it is not reasonable or just that, by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts; and, nevertheless, it hath often so happened, that where several persons having, by bonds or other specialties, bound themselves and their heirs, and have afterwards died seised in fee-simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of, or charge the same, by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments devised the same, or disposed thereof, in such manner as such creditors have lost their said debts: for remedying of which, and for the maintenance of just and upright dealing,

Be it enacted, That all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed and taken (only as against such creditor or creditors as aforesaid, his, her, and their heirs, successors, executors, administrators, and assigns, and every of them) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect.

And for the means that such creditors may be enabled to recover their said debts, be it enacted, That in the cases before mentioned, every such creditor shall and may have and maintain his, her, and their action and actions of debt, upon his, *her, and their said bonds and [*216] specialties, against the heir and heirs at law of such obligor or obligors, and such devisee and devisees, jointly, by virtue of this Act; and such devisee or devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended.

Provided always, and be it enacted, That where there hath been, or shall be, any limitation, or appointment, devise, or disposition, of or

(b) 2 Atk. 432.

(c) 4 East, 491; 7 East, 135; 2 Atk. 392, 432; 2 Anstr. 515.

(d) 1 P. W. 777.

(e) 1 P. W. 777. See also ib. 431.

concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, other than the heir at law, according to or in pursuance of any marriage contract or agreement in writing, *bonâ fide* made before such marriage, the same and every of them shall be in full force; and the same manors, messuages, lands, tenements, and hereditaments, shall and may be holden and enjoyed by every such person or persons, his, her, and their executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition, was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised, or disposed, until such debt or debts, portion or portions, shall be raised, paid, and satisfied.

And whereas several persons, being heirs at law, to avoid the payment of such just debts, as in regard of the lands, tenements, and hereditaments, descending to them, they have by law been liable to pay, have sold, aliened, or made over such lands, tenements, or hereditaments, before any process was or could be issued out against them, be it enacted, That in all cases where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands, tenements, or hereditaments, descending to *him, and shall sell, alien, or make over the
[*217] same, before any action brought, or process sued out, against him, that such heir at law shall be answerable for such debt or debts, in an action or actions of debt, to the value of the said land so by him sold, aliened, or made over; in which cases all creditors shall be preferred as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving, that the lands, tenements, and hereditaments, *bonâ fide* aliened before the action brought, shall not be liable to such execution.

Provided always, and be it enacted, That where any action of debt upon any specialty is brought against any heir, he may plead *riens per descent* at the time of the original writ brought, or the bill filed against him; and the plaintiff in such action may reply, that he had lands, tenements, and hereditaments from his ancestors, before the original writ brought, or bill filed; and if, upon issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments, so descended, and thereupon judgment shall be given, and execution shall be awarded, as aforesaid: but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, tenements, or hereditaments, so descended.

Provided also, and be it further enacted, That all and every devisee and devisees, made liable by this Act, shall be liable and chargeable in the same manner as the heir at law, by force of this Act, notwithstanding the lands, tenements, and hereditaments, to him or them devised, shall be aliened before the action brought.

Under the words "power to dispose of" used in section II., leasehold
[*218] estates *pur auter vie* are construed to be within the *statute, and a devise, therefore, of them has been decided to be void

against creditors.(f) Under Section III. it is decided, that the action thereby given is limited to an action of debt, and does not extend to an action of covenant for the recovery of damages.(g) If a creditor files a bill in equity against the devisee, the heir at law of the testator must be made a defendant in the suit.(h) He is likewise a necessary party in a suit in equity against the assignees of the devisee, who is a bankrupt.(i) In an action against the heir and devisee, a plea put in by either, and which confesses lands descended or devised, must particularly specify or describe those lands.(j)

A person, by a bond, without a penalty, bound himself and his heirs to pay an annuity; and, by his will, devised all his freehold lands, in trust for his son. The son died under twenty-one, and the trustee being held to take an estate only until the son died, in an action brought on the bond against the trustee, for arrears of the annuity become due after the son's death, it was decided that the action could not be maintained; on the grounds, that the plaintiffs were not creditors in the time of the testator, and that they had received all that for which they became creditors in the time of the devisee; that the statute 3 and 4 W. and M. c. 14, therefore, did not affect the question, and, as the defendant no longer had the land, he could not be charged in the action.(k)

Where a bill was filed by creditors for satisfaction out of real assets descended to an infant heir, Sir L. Kenyon said, he could not make this direction, because the parol might demur; but he ordered a receiver to be appointed of the real estate descended.(l) In another case, however, where a person devised one of his estates to his heir at law, charged with the payment of two *legacies, and devised other estates to [*219] his heir, without any charge on them, counsel argued that, "as to the estate charged with the legacies, the parol would not demur; for the legatees had a right to have their legacies immediately raised, they being expressly charged on that estate; but that the legacies could not be raised, until the specialty creditors were satisfied; and therefore the payment of the specialty debts was incidental to the raising of the legacies, which took this case out of the common rule of the parol demurring, so far as respected the charged estate." Lord Loughborough "was of this opinion, and ordered the charged estate to be sold."(m) A person by his will gave to his only child T. D., an infant, all his water corn-mill, with the appurtenants, and three cow commons on Morton Heath; to hold to the said T. D., his heirs and assigns, after age; and in case of the death of T. D. under age, then the testator gave the said mill, &c., to M. D. The testator's specialty creditors having exhausted his personal estate, and his creditors by simple contract applying to stand in their place, Sir W. Grant held the estate could not be sold until the infant came of age; saying, "The devisee is an infant, and therefore I cannot order the estate to be sold, until he comes of age. I can only

(f) *Westfaling v. Westfaling*, 3 Atk. 460, 465.

(g) *Wilson v. Knubley*, 7 East, 128.

(h) *Gawler v. Wade*, 1 P. W. 99, cited 2 Atk. 434, 435; *Warren v. Stawell*, 2 Atk. 125. If there is no heir, or the plaintiff cannot discover one, see *Gawler v. Wade*, above, and 7 East, 133, where it is cited.

(i) *Warren v. Stawell*, 2 Atk. 125.

(j) *Gott v. Atkinson*, Willes, 521.

(k) *Morant v. Gough*, 7 B. & C. 206, 1 Mann. & Ryl. 41.

(l) *Sweet v. Partridge*, 2 Dick. 696, 1 Cox, 433, cited 2 Jack. & W. 290.

(m) *Mould v. Williamson*, 2 Cox, 386.

declare, that the simple contract creditors are entitled to stand in the place of the specialty creditors; with liberty to apply, when the infant comes of age, to have the estate sold to pay their debts."⁽ⁿ⁾ Here the infant devisee appears to have been the testator's heir at law. *Plasket v. Beeby* decides, that an infant devisee, against whom an action at law is brought, is not, like an infant heir at law, entitled to the privilege of praying that the parol may demur until he is of age.^(o)

The proviso in Section IV. extends to make valid a devise, or disposition, by which a person in his will devises land, in trust for,^(p) or charged with,^(q) the payment of his debts; as if he gives to trustees all [*220] his lands, upon trust to sell, and to apply the "money arising from such sale in payment of his just debts;^(r) or charges all his lands with the payment of his debts, and gives all his real estate to G., his heirs and assigns, chargeable nevertheless with the payment of the testator's debts and legacies.^(s)

Contrary to some former cases,^(t) which must now be considered to be overruled, to come within Section IV. of the statute, it is not necessary that the disposition in the will break the descent to the testator's heir at law; for although the descent is not broken, yet if the land descends, charged by the will with the payment of debts, this charge is construed to be a disposition within the proviso of that section of the statute; in other words, is not fraudulent within the intent of the statute.^(u)

A person, who by his will makes real estate a fund for the payment of his debts, may confine this fund to a particular part only of his property. To pay the debts he may devise to trustees a particular estate, excepting the capital mansion-house; and this devise may not be fraudulent under the statute.^(v) So he may prescribe a particular manner to pay the debts; and this manner may not vitiate the disposition made by him. A devise, for instance, of land, in trust to pay debts, may not be fraudulent under the statute, and may come within the proviso of Section IV., and be therefore valid, although the trust created is to pay the debts out of the yearly rents and profits only; a devise that does not authorize a Court of Equity to decree a sale of the land. Such a devise occurred in *Lingard v. Earl of Derby*, where the Master of the Rolls ordered the money for the payment of debts to be raised by mortgage. But it appearing by the Master's report, that a sufficient sum could not be raised by mortgage, it became a question whether the Court could, under the will, order a sale. And it was decided that a sale could not be decreed; Lord Loughborough saying, "Where the devise is, to pay the [*221] debts out of the profits of the estate, it is equivalent to a devise to the trustees to sell, and a decree for a sale is only an execution of that trust. But I am afraid you will find that, both by

(n) *Powell v. Robins*, 7 Ves. 209.

(o) 4 East, 485, 1 Smith, 264.

(p) *Earl of Bath v. Earl of Bradford*, 2 Ves. 687.

(q) *Kent v. Craig*, cited 2 Atk. 291, 293.

(r) *Gott v. Atkinson*, Willes, 521; *Gott v. Vavasor*, S. C., 2 Barnes, 136.

(s) *Elliott v. Merryman*, Barn. Ch. Rep. 78, 80, 2 Atk. 41.

(t) *Freemoult v. Dedire*, 1 P. W. 439, 431; *Plunket v. Penson*, 2 Atk. 290; *Young v. Denmet*, 2 Dick. 452.

(u) *Hargrave v. Tindal*, 1 Bro. C. C. 136, n.; *Bailey v. Ekins*, 7 Ves. 319; *Shiphard v. Lutwidge*, 8 Ves. 26.

(v) *Hughes v. Doulben*, 2 Bro. C. C. 614, 2 Cox, 170.

the words and construction of the Statute of Fraudulent Devises, where there is a devise for the payment of debts, it takes the case out of the statute, and it stands as it would have done before the statute was made; the creditor can come only as the will directs. I take it to be the clear intent of the testator here, that not an acre should be alienated for the payment of his debts; therefore, there cannot be a sale."^(w) It appears, however, that if a will contains a disposition of a particular part only of real estate for the payment of debts, although the statute may make this disposition valid, yet, if such part is not sufficient to pay the debts, the statute has not the effect to confine the creditors to that part only, and they are entitled to come upon the remainder of the estate.^(x) And so if a particular manner is prescribed to pay the debts, as by payment out of yearly rents and profits, the creditors are not confined to this manner, if the fund constituted by it is ultimately insufficient to pay them. The observations which Lord Thurlow has made on Lord Loughborough's opinion, expressed in *Lingard v. Earl of Derby*, are a full authority to this effect. Lord Thurlow says, "As to the case that has been cited, if it only meant to determine, that the inconveniency of the mode prescribed by the testator for the payment of his debts would not bring it within the Statute of Fraudulent Devises, provided the fund was ultimately sufficient, I agree with that case; but if it was meant to be laid down, that even though by the mode prescribed the fund would turn out ultimately insufficient for the purpose, I never can accede to that. Whenever such a case comes before me, I will refer it to the Master to state to me, whether, according to the mode prescribed by the testator, the debts could be paid; and if the Master tells me that the debts cannot be paid by this mode, I will consider this as a fraudulent devise, until I am controlled by the House of Lords."^(y) And Lord Eldon has said, "I agree with Lord Thurlow, that although a devise [*222] for the payment of debts by rents and profits would be out of the Statute of Fraudulent Devises, the Court would not be willing to adopt the limited construction; but would, upon a devise of a gross sum out of rents and profits for that purpose, hold, that the testator intended the debts to be paid with all convenient speed."^(z)

Where a person devised a great part of his real estate, in trust for the payment of all his debts, except such as he had contracted by being bound as surety for H., Lord Hardwicke expressed an opinion, "If this had been a devise for the payment of all his debts generally, undoubtedly this would have been good, within the proviso of the Statute of Fraudulent Devises. But as this devise was not for the payment of all his debts generally, this case is not within the benefit of that proviso."^(a) It appears, however, his Lordship afterwards said he had a doubt whether this opinion, which he had before given, was right or not; and he reserved the question.^(b) It has been observed by Sir W. Grant, that "though the Statute of Fraudulent Devises would undoubtedly prevent a devise for payment of legacies, so as to disappoint creditors by speciality,

(w) 1 Bro. C. C. 311, cited 3 Ves. 119.

(x) *Hughes v. Doulben*, 2 Bro. C. C. 614, 2 Cox, 170.

(y) 2 Cox, 170; 2 Bro. C. C. 614.

(z) *Boottle v. Blundell*, 19 Ves. 528. See 1 Meriv. 232, 233.

(a) *Vernon v. Vawdrey*, Barn. Ch. Rep. 280, 304; cited Coop. Rep. 45, where counsel said the report is confirmed by the Reg.-B.

(b) Barn. Ch. Rep. 307.

it would not prevent a devise for payment of debts generally, though the effect would be to let in creditors by simple contract, to the prejudice of creditors by specialty."^(c) The latter creditors are prejudiced, because the devise makes the estate equitable assets, and accordingly distributable amongst them and simple contract creditors equally.^(d) But specialty creditors may not only be injured to this extent, but may also, by a devise for payment of debts, be postponed to creditors by simple contract. Lord Chief Justice Willes was of opinion, that if there is a devise for the payment of any particular debt upon simple contract, it will be a good devise against bond creditors.^(e) And where a person by [*223] his will directed "his *personal estate to be applied, in the first place, in the payment of debts out of his family, and to strangers, and his real estate to be sold, and simple contract creditors to have a preference, and then to pay specialty creditors;" Sir W. Grant decided, that "this devise satisfied the words of the proviso, being for the payment of debts."^(f) And here it may be mentioned, that in a case in which a person, having an equity of redemption in fee in land, devised the land and equity of redemption to trustees, in trust to sell the devised premises, and thereby to pay all his debts; Lord King said, the testator "might give his equitable assets, in what manner and upon what terms he pleased; for instance, he might dispose of them in trust to pay his simple contract debts only; though it was true he had no power by his will to dispose of his personal estate from his creditors, or to devise it for satisfaction of his simple contract creditors, in preference to his specialty creditors; but these equitable assets being entirely within his power, he might let in the specialty creditors for a satisfaction thereof, under what terms he should think proper."^(g) "The uniform rule," Lord Eldon says, "is, that a provision by will, effectual, in law or in equity, for payment of creditors, is not fraudulent within the intent of the statute."^(h) And it seems, also, it may not be fraudulent, although it is not effectual to pay all the creditors of the testator. For it may, it is apprehended, be stated, that a devise, or other testamentary disposition, for the payment of debts, may not be fraudulent, although all the testator's debts may neither be the object of such disposition, nor be capable of satisfaction under it; for, as before is mentioned, there is an express opinion of Lord Chief Justice Willes, that a devise for the payment of any particular debt upon simple contract is a good devise against bond creditors;⁽ⁱ⁾ and *Millar v. Horton* decides, that the testator may give to simple contract creditors a preference before creditors by specialty;^(j) [*224] and in either case, the fund may not be sufficient *to pay both classes of debt. But to make the devise or other disposition not fraudulent, the manner or mode which it prescribes to pay the debts, the satisfaction of which is the object of the devise, must be effectual for the purpose.^(k)

"Before the statute of 3 W. III., c. 14, the heir was not bound by lands descending to him, where sold or aliened before action brought;

(c) 12 Ves. 154.

(d) *Haslewood v. Pope*, 3 P. W. 323; 1 P. W. 228, 329, in arg.

Silk v. Prime, 1 Bro. C. C. 138, n.

(e) Willes Rep. 524.

(f) *Millar v. Horton*, Cooper, 45.

(g) *Deg v. Deg*, 2 P. W. 418. See also

(h) 7 Ves. 323.

(i) Willes, 524.

(j) Cooper, 45.

(k) 2 Cox, 170; 2 Bro. C. C. 614.

and if an obligor devised his land, the devisee so selling was not liable to the obligee.”(l) Section V. of that statute provides an action of debt against the heir, to whom land is descended, if he aliens the land before he is sued by his ancestor’s creditors. And it appears that, as before the statute, the creditors might, against such alienation, obtain relief in a Court of Equity,(m) so this Court has likewise relieved them since the statute.(n) The heir or devisee, who aliens the land, continues afterwards to be personally responsible for the debts of the ancestor or testator;(o) but, neither at law, nor in equity, is the land, or purchaser of it, liable to such debts, after it is *bond fide* aliened by the heir,(p) or devisee.(q)

When a person dies indebted by bond, in which his heirs are bound, and at his death land in possession, that is, an estate in fee in possession, as distinguished from reversion, descends to his heir; here, if the heir devises the land, this devise is within the statute, and fraudulent and void, as against the bond creditor of the ancestor.(r) And such a devise may likewise be fraudulent, although the estate descended to the heir is a reversion in fee, expectant on an estate tail. In *Kinaston v. Clark*, T. D. settled his estate on himself for life, remainders over for life, remainder to his first and every other son in tail male, remainder to himself in fee. There was issue a son. The father died indebted by bond; and *the son died afterwards without issue, but by his will [*225] devised the estate to the defendant in fee. Lord Hardwicke decided that this reversion, being come into possession, was assets to pay the debts of the father, notwithstanding the son had devised it to the defendant. And, by circuit, the simple contract creditors are, he said, to stand in the place of satisfied bonds.(s) A principal ground of this decision is, that where, by the bond of a person, his heirs are bound, “the heir is as much debtor upon the bond as the obligor.(t) Of a reversion in fee, expectant on an estate tail, Sir T. Plumer also has said, “The heir cannot devise it: any disposition of it, whether made by the will of the ancestor, or of the heir, is null and void, as against creditors, by the statute 3 W. & M., c. 14.”(u) And, speaking of *Kinaston v. Clark*, the same learned judge says, the question there was, whether, pending the estate tail, the heir could devise the estate; and Lord Hardwicke, though entertaining much doubt, determined that his devise was void under the statute.(v)

It may in this place be stated, that, although a debt by bond, in which the heirs of the obligor are bound, is the debt of the heir, because his ancestor has bound him, “yet he is liable no farther than to the value of the land descended; and as soon as he has paid his ancestor’s debts to the value of the land, he shall hold the land discharged; otherwise he might be chargeable *ad infinitum*.”(w)

(l) By Lord Hardwicke, 2 Atk. 204; *Denton’s case*, Clayton, 106.

(m) 1 P. W. 777.

(n) *Bateman v. Bateman*, 1 Eq. Cas. Abr. 149.

(o) Stat. 3 and 4 W. & M. c. 14, s. 5, 7; 2 Anstr. 514, 515.

(p) Stat. 3 and 4 W. & M. c. 14, s. 5; 2 Anstr. 514, 515.

(q) Stat. 3 and 4 W. & M. c. 14, s. 5, 7; *Mathews v. Jones*, 2 Anstr. 506, 514, 515.

(r) 2 Atk. 206.

(s) 2 Atk. 204; stated from MS. 2 Cruise Dig. 2d ed. 447; and cited Jacob Rep. 219.

(t) 2 Atk. 205; 2 Cruise Dig., 2d ed. 465.

(u) Jacob Rep. 218.

(v) Ibid. 219.

(w) *Buckley v. Nightingale*, 1 Stra. 665.

SECTION II.

STAT. 47 GEORGE III. ST. 2, C. 74.

THE statute 47 Geo. III. st. 2, c. 74, enacts, That from and after the passing of this Act, when any person, being at the time of his death a [*226] trader within the true intent and meaning of the *laws relating to bankrupts, shall die seised of, or entitled to, any estate or interest in lands, tenements, hereditaments, or other real estate, which he shall not by his last will have charged with, or devised subject to or for, the payment of his debts, and which, before the passing of this Act, would have been assets for the payment of his debts due on any specialty, in which the heirs were bound, the same shall be assets to be administered in Courts of Equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir, or heirs at law, devisee, or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they were before the passing of this Act liable to at the suit of creditors by specialty, in which the heirs were bound. Provided always, that, in the administration of assets by Courts of Equity, under and by virtue of this Act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract, or by specialty, in which the heirs are not bound, shall be paid any part of their demands.

To bring a case within this statute, the deceased must have been a trader at the time of his death. In *Reene v. Riley*, simple contract creditors moved for a receiver; but it being contended, that, as the testator had not by his will charged his real estate with the payment of his debts, the Court had no jurisdiction to appoint a receiver, the testator not being a trader at the time of his death, Lord Eldon, upon hearing the clause of the statute read, said that was his opinion.(x) Also in *Hitchon v. Bennett*, where the question was, whether the real estate of a person deceased, was, under the statute, liable to the payment of his simple contract debts, Sir John Leach stated,—“The law remains as before the statute, unless the deceased was a trader at the time of his death. The Master has found that this testator had discontinued trading from the year 1794, being [*227] two years previous to his death, and it [I] cannot therefore apply to his estate the *provisions of this statute. It is said that this construction will enable a man, labouring under a mortal disease, to quit his trade, and thus exonerate his real estate. In such a case, it would be difficult to avoid an imputation of fraud, that would frustrate his purpose. But if a man should happen to die the day after he has *bonâ fide* quitted trade, this statute does not apply to his estate.(y) In *Lechmere v. Brasier*, where a bill in equity was filed by simple contract creditors of an intestate against his infant heir at law, and a decree had been made, ordering a sale of the real estate, Lord Eldon expressed a doubt, if the decree ought to have been for a sale during the infancy of the heir, as the parol might demur.(z) An admission by an executrix of a simple contract debt was, in *Putman*

(x) 8 Mer. 436.

(y) 4 Madd. 180.

(z) 2 J. & W. 287.

v. Bates, held not to take the debt out of the Statute of Limitations, so as to entitle the creditor to a decree for payment out of real estate devised. The defendants were S. B., the executrix and devisee of a moiety of the real estate, of which the testator died seised, and B. and his wife, who were the devisees of the other moiety. Proof was given of payment of part of the debt by the executrix within six years; but there was no evidence of any admission of the debt by B. and his wife. And the question being, whether the plaintiff was entitled to any decree against B. and his wife, and against so much of the real estate as they were interested in, Lord Gifford said, "The plaintiff admits that he must prove the debt against the executrix, and that he must also prove an admission within six years. He admits farther, that, for the purpose of affecting the real estate, he must prove the debt against the heir or devisee, as well as against the executrix. If, in a proceeding at law, he were to recover on a promise made by the executrix, he can scarcely contend that such a judgment would be evidence against the heir or devisee. But as the original existence of the debt must be proved against the devisee, it is not equally necessary to prove against him an admission of the debt within six years. If the admission by the executrix within six years be sufficient to take the case out of the Statute of Limitations as *against the heir or devisee, why should not her [*228] admission be equally evidence against him as to the original existence of the debt? If it be necessary to prove the debt against the devisee, it must be equally necessary to prove some admission within six years, that can affect him. The decree can be only against S. B." (a) In *Horn v. Horn*, a person, who was at the time of his death a trader, devised his real estates, subject to the payment of legacies, to his son J. H. in fee. And on a bill filed by legatees for payment of their legacies, Sir John Leach decided, that the purchaser from an heir or devisee of a trader is bound to see to the application of his purchase money in satisfaction of legacies charged on land descended or devised, notwithstanding the statute 47 Geo. III. st. 2, c. 74, by which simple contract debts are also to be paid out of the land. (b)

SECTION III.

STAT. 11 GEORGE IV. AND 1 WILLIAM IV. C. 47.

THE statutes 3 and 4 William and Mary, c. 14, and 47 Geo. III. st. 2, c. 74, yet remain in force, so far as their provisions and remedies affect the real estates of persons, who died before the 16th July, 1830, at which time the following statute, 11 Geo. IV. and 1 Will. IV. c. 47, passed. And which Act, it will be seen, repeals the two former statutes, and, with respect to certain debts of persons in being on or after the 16th July, 1830, consolidates and enlarges the provisions of the Acts repealed.

Whereas an Act was passed in the third and fourth years of King William and Queen Mary, intituled "An Act for the relief of Creditors

(a) 3 Russ. 188.

(b) 2 Sim. & St. 448.

against Fraudulent Devises," which was made perpetual by an Act passed in the sixth and seventh years of King William the Third, intituled, "An Act for continuing several Laws therein mentioned." And whereas an Act was passed by the Parliament of Ireland, in the fourth year of Queen [*229] Anne, intituled, "An Act for Relief of *Creditors against Fraudulent Devises." And whereas an Act was passed in the forty-seventh year of his late Majesty King George the Third, intituled, "An Act for more effectually securing the Payment of Debts of Traders." And whereas it is expedient that the provisions of the said recited Acts should be enlarged, and that the said recited Acts should be repealed, in order that all the provisions relating to this matter should be consolidated into one Act. Be it therefore enacted, that the said several recited Acts shall be, and the same are hereby repealed, but so as not to affect any of the provisions and remedies of the said Acts, or any of them, to the benefit of which any persons are entitled, as against any estate or interest in any lands, tenements, hereditaments, or other real estates, of any person or persons who died before the passing of this Act.

And whereas it is not reasonable or just that, by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having, by bonds, covenants, or other specialties, bound themselves and their heirs, and have afterwards died seised in fee simple, of, and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments devised the same, or disposed thereof in such manner as such creditors have lost their said debts, for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted, That all wills and testamentary limitations, dispositions, or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons at the time of his, her, or their decease shall be seised in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last [*230] wills or testaments, shall be *deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them, with whom the person or persons making any such wills or testaments, limitations, dispositions or appointments, shall have entered into any bond, covenant, or other specialty, binding his, her, or their heirs,) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding.

And for the means that such creditors may be enabled to recover upon such bonds, covenants, and other specialties, be it further enacted, That in the cases before mentioned, every such creditor shall and may have and maintain his, her, and their action and actions of debt or covenant upon the said bonds, covenants, and specialties, against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such

devisee and devisees, or the devisee or devisees of such first mentioned devisee or devisees, jointly, by virtue of this Act; and such devisee or devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended.

And be it further enacted, That if in any case there shall not be any heir at law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor, to whom by this Act relief is so given, shall and may have and maintain his, her, and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid.

Provided always, and be it further enacted, That where there hath been or shall be any limitation *or appointment, devise or disposition, of or concerning any manors, messuages, lands, tene- [*231] ments, or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, according to or in pursuance of any marriage contract or agreement in writing, *bond fide* made before such marriage, the same and every of them shall be in full force, and the same manors, messuages, lands, tenements, and hereditaments, shall and may be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised, or disposed, until such debt or debts, portion or portions, shall be raised, paid, and satisfied.

And be it further enacted, That in all cases where any heir at law shall be liable to pay the debts, or perform the covenants, of his ancestors, in regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir at law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments, *bond fide* aliened before the action brought, shall not be liable to such execution.

Provided always, and be it further enacted, That where any action of debt or covenant upon *any specialty is brought against the [*232] heir, he may plead *riens per descent*, at the time of the original writ brought, or the bill filed against him; and the plaintiff in such action may reply, that he had lands, tenements, or hereditaments, from his ancestor, before the original writ brought, or bill filed; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments, so descended, and thereupon judgment shall be given, and execution shall be awarded, as aforesaid; but if judgment be given against such heir, by

cordingly, be assets when they are situated in Ireland,(c) or consist of a sum of money, which is a part of the *rentes* or public debt of France.(d) In a late case, a testator, an Englishman, a British subject, and domiciled in England, died possessed of property in the American, Austrian, French, and Russian funds; and it was decided, that this property, or stock, was, for the purpose of being liable to the legacy duty, English personal property; the executor being a person living in England, an English executor, and having, as executor, dealt with the stock, by causing it to be transferred into his own name, and, by power of attorney, [*236] authorising the *dividends to be paid to the legatees.(e) And there it appears to be admitted by Bayley, B., "that if there had been a deficiency of assets in this country, to meet the debts of the testator, it would have been the duty of the executor to have sold this property, and to have brought it bodily into this country, as that which was to be resorted to; and that it would have been a *devastavit*, if he had not adopted that plan, if there were debts."(f)

The fourth section of the statute 5 George II. c. 7, "An Act for the more easy recovery of debts in his Majesty's Plantations and Colonies in America," makes real estates in those plantations and colonies assets for debts, in like manner as real estates were, at that time, by the law of England, liable to debts by specialty.(g) The statute enacts, That from and after the 29th September, 1732, the houses, lands, negroes, and other hereditaments and real estates, situate or being within any of the said plantations, belonging to any person indebted, shall be liable to, and chargeable with, all just debts, duties, and demands, of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects; and shall and may be assets for the satisfaction thereof, in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process, in any Court of law or equity, in any of the said plantations, respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates in any of the said plantations, respectively, are seized, extended, sold, or disposed of, for the satisfaction of debts.(h)

[*237] *The following statute, 9 George IV. c. 33, is "An Act to declare and settle the law respecting the liability of the real estates of British subjects, and others, situate within the jurisdiction of his Majesty's Supreme Courts in India, as assets in the hands of executors and administrators, to the payment of the debts of their deceased owners." It enacts,—

That whenever any British subject shall die seized of or entitled to any

(c) *Dowdale's case*, 6 Co. 46 b.; *Richardson v. Dowdale*, S. C., Cro. Jac. 55. See also *ib.* 503.

(d) *Attorney General v. Dimond*, 1 Crompt. & Jerv. 356, 370, 1 Tyrwh. 243.

(e) *Ewin's, or Ewing's case*, 1 Crompt. & Jerv. 151, 1 Tyrwh. 91.

(f) 1 Crompt. & Jerv. 157.

(g) See *Manning v. Spooner*, 3 Ves. 118, and *Thomson v. Grant*, 1 Russ. 540 n. On

the liability of a plantation in Barbadoes to debts, see 4 Mod. 326, and *Noel v. Robinson*, 1 Vern. 90, 453, 460, 469, 2 Ch. Rep. 248, 2 Ventr. 358; *Robinson v. Noel*, S. C., 2 Ch. Cas. 145. And, generally, on Colonial Law, see *Howard on the Laws of the British Colonies in the West Indies*, and other parts of America.

(h) So much of this act as relates to Negroes, is repealed by stat. 37 Geo. III. c. 119.

real estate in houses, lands, or hereditaments, situate within or being under the general civil jurisdiction of His Majesty's Supreme Courts of Judicature at Fort William in Bengal, Fort St. George, and Bombay respectively; or whenever any person (not being a Mahomedan or Gentoo) shall die seised of or entitled to any such real estate, situate within the local limits of the civil jurisdiction of the same Courts respectively; such real estate of such British subject or other person as aforesaid (not being a Mahomedan or Gentoo) is and shall be deemed assets, in the hands of his or her executor or administrator, for the payment of his or her debts, whether by specialty or simple contract, in the ordinary course of administration.

That it is and shall be lawful for such executor or administrator of such British subject or other person as aforesaid (not being a Mahomedan or Gentoo) to sell and dispose of such real estate for the payment of such debts as aforesaid, and to convey and assure the same estate to a purchaser, in as full and effectual a manner in law as the testator or intestate of such executor or administrator could or might have done in his life-time.

That in any suit or action to be commenced and prosecuted in any of the said Courts respectively, against such executor or administrator as aforesaid, for the recovery of any debt or demand, due and owing by such testator or intestate in his life-time, and at the time of his death, such executor or administrator shall and may be charged with the full amount in value of such real estate as aforesaid, not exceeding the [*238] actual net *proceeds of such estate when sold by the sheriff, as assets in the hands of such executor or administrator to be administered.

That in any such suit or action against such executor or administrator as aforesaid, it is and shall be lawful for the said Courts respectively to award and issue such writs of sequestration and execution against such houses, lands, and real effects of such testator or intestate, in the hands of such executor or administrator as aforesaid; and to cause the same to be seized, sequestered, and sold, or possession thereof delivered under such writs respectively; in the same manner as such Courts could and might have done in the life-time of such testator or intestate as aforesaid.

That all conveyances and assurances of such real estates of such British subjects and other persons, so dying seised or entitled as aforesaid, (not being Mahomedans or Gentoos,) situate within or being under the general or local jurisdiction of such Courts respectively as aforesaid, heretofore made and executed by executors and administrators of such deceased British subjects and other persons as aforesaid, are hereby confirmed, and shall be deemed, held, and taken to be of the same force, validity, and effect in law, as if the same had been made and executed by such deceased persons in their life-time.

That neither this Act, nor any thing herein contained, shall be construed to operate as or have the effect of changing or altering the legal quality, nature, or tenure, of any lands, houses, estates, rights, interests, or any other subject of property whatsoever, or of making the same or any of them to be of the nature of real property, if by law, before the passing of this Act, the same or any of them were personal property; but that the law in that respect shall be and continue the same, as if this Act had not passed.

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*CHAPTER XVII.

OF PROPERTY, WHICH IS NOT ASSETS.

IT appears that, among other instances, (a) property and things, which, by or in a Court of Law, have been held not to be assets, are,—a debt due to a testator; for, until paid, the debt is in action, and not in possession: (b) bonds and specialties, which “are no assets, until the money is paid:” (c) goods taken from a testator in his life-time, “so as they never were but a chose in action to the executor;” which goods are not assets until they are recovered: (d) an intestate’s goods taken away by wrong before administration granted; which goods are “not assets in the hands of the administrator, till they be converted, or damages for them:” (e) a testator’s goods, taken and converted after his death, and before they come to the actual possession of the executor: (f) the profits of a leasehold for years, on which an executor has entered, and which profits do not exceed the amount of the rent: (g) goods which [*240] belonged to a testator, and which his executors had in their hands; in a case, where they had paid to the value of them, in their own money, to others, to whom the testator was indebted; (h) and in a case, where, for a debt secured by bond of a testator, his executors took in the bond, and gave their own bond to the obligee for payment of the same debt: (i) plate pledged by a testator for its full value, and redeemed by his executors with their own money: (j) a testator’s goods, retained by an executor in satisfaction of his own debt; (k) a chattel recovered by an executor in an action at law; which chattel, though he has judgment, yet till execution is not assets in his hands: (l) rent received by executors continually after their testator’s death, under a lease which the testator made for years, rendering a rent to him, and to his heirs and assigns: (m) certain goods, which, being distrained and impounded, an executor has in his hands: (n) a right to present to a church, vacant at the death of the patron, seised in fee or in tail of the advowson, and which right devolves

(a) Archbishop Cranmer’s case, 3 Dyer, 309 b., 3 Leon. 7, 3 Leon. 23; *Crosman v. Reade*, 1 Leon. 320, Cro. Eliz. 114, Mo. 236; *Lawrence v. Beverleigh*, or *Beverly*, 2 Keb. 841, also stated 2 Vern. 55, and Nels. Rep. 165, and cited 1 Vern. 471, and 3 P. W. 217; *Edwards v. Graves*, Hob. 265; *Nicols v. Bride Bridge*, 12 Mod. 381; *Yard v. Eland*, or *Ellard*, 1 Ld. Raym. 368, 12 Mod. 207; *Deering v. Torrington*, 1 Salk. 79; *Parker v. Baylis*, 2 Bos. & P. 73; *Roe v. Harrison*, 2 Durn. & E. 425, 429.—Bro. Abr. tit. Executors, pl. 179; 2 Leon. 143, 143; 1 Rol. Abr. 923, M. pl. 3; 6 Co. 56 b.; Cro. Eliz. 43; Cro. Jac. 142; Hardr. 489; Cas. T. Holt, 297, 313, 314; 3 Vin. Abr. 141, pl. 7. See also Anon. Gouldsb. 79, Ca. 15; Anon. ib. 88, Ca. 14; and *Eveling v. Leveson*, ib. 115; and, farther, Co. Litt. 113 a., 236 a.; Bro. Abr. tit. Executors, pl. 150, tit. Propertie, pl. 50; 1 Salk. 154; Wentw. Off. Ex. ch. 5 & 6; and *Shep. Touchst.* 498. On the property of a bailee, or pledgee, in goods bailed or pledged, see 2 Bl. Com. 396; *Sir W. Jones on Bailm.*

75—86; and *Ratcliffe v. Davies*, Cro. Jac. 244.

(b) Bro. Abr. tit. Executors, pl. 112; Anon. Owen, 36.

(c) 1 Ventr. 96.

(d) *Bethel v. Stanhope*, Cro. Eliz. 810.

(e) *Keble v. Osbaston*, Hob. 49.

(f) *Jenkins v. Plombe*, or *Plume*, 6 Mod. 94, 1 Salk. 208.

(g) *Buckley v. Pirk*, 1 Salk. 79, 316, 10 Mod. 12; *Body v. Hargrave*, Cro. Eliz. 712.

(h) *Langston v. Dive*, cited Plowd. 186; Anon. 20 Hen. VII., cited *Keilw.* 59 b.; Anon. 1 Rol. Abr. 923, M. pl. 2.—1 Dyer, 2 b., pl. 4, 7; 1 Leon. 112; 2 Leon. 31, 90.

(i) *Stampe v. Hutchins*, 1 Dyer, 2 a., pl. 3, n., Cro. Eliz. 120, 1 Leon. 111.

(j) Anon. 1 Dyer, 2 a., pl. 3, 6; Anon. *Keilw.* 58 a., Ca. 2, 61 b.; Anon. 1 Rol. Abr. 923, M. pl. 1.

(k) *Keilw.* 63 a.

(l) 6 Mod. 93; 1 Salk. 207.

(m) Anon. 3 Dyer, 361 b., Ca. 15.

(n) Anon. Cro. Eliz. 23.

to his executor, and not to his heir: (o) copyholds held at the will of the lord: (p) a right of entry or of action; which right (without any estate in possession, reversion, or remainder) "is not yet assets, until it be recovered, and reduced into possession." (q)

Among other instances, (r) it appears that property or things, *which, by or in the Court of Equity, have been [*241] held not to be assets are,—money, which a person had a power to raise, by appointment by deed or will, and which power he did not execute: (s) money for which a factor sold goods of his principal; in a case, where the factor died before payment, and it was decided the money was not part of his assets: (t) a leasehold estate; in a case, where R. renewed the lease in his own name and in that of his brother J., and R. alone paid the fine and rents, and received the profits, and where it was decided, such leasehold estate was not part of the assets of R., there being sufficient evidence, although but of one witness, to rebut the resulting trust: (u) a sum of money, which executors found in a box in their testatrix's house, and which money they stated to belong to several persons, who were members of a club held at her house: (v) a wife's present *choses in action, [*242] namely, bond debts; which it was decided were not assets of her husband, who died in her life-time, before he had reduced them into possession; and where it was held such choses in action were not purchased by the husband, by a settlement made by him previously to the marriage: (w) copyholds held at the will of the lord. (x) In a case where

(o) Co. Litt. 388 a.; *Rennell v. Bishop of Lincoln*, 3 Bing. 264, 272, 7 B. & C. 147, 150, 151, 180, 185, 193, 195.

(p) 4 Co. 22 a.

(q) 6 Co. 58 a., 58 b.; Co. Litt. 374 b.

(r) *Jones v. Bradshaw*, 3 Ch. Rep. 2, 2 Freem. 153, Nels. 74; *Anon.*, or *Turney v. Daws*, 2 Ch. Cas. 232; *Dunn v. Green*, 3 P. W. 9, 11; *Charlton v. Low*, ib. 330; *Anon.* 2 Eq. Cas. Abr. 509, Ca. 3; *Lord Townshend v. Windham*, 2 Ves. 1, 4, 5; *Hassall v. Smithers*, 12 Ves. 119. See also *Rutland v. Molinoux*, 2 Vern. 64; *Kingdon v. Bridges*, ib. 67; *Plowman v. Plowman*, ib. 289, and 3rd ed. n.; *Goodfellow v. Burchett*, ib. 298; *Fletcher v. Lady Sedley*, ib. 490, and 3rd ed. 491 n.; *Armitage v. Metcalf*, 1 Ch. Cas. 74; *Holt v. Holt*, ib. 190, cited 1 Vern. 92, and 2 Vern. 57. Of a personal annuity, granted to a person and his heirs, see *Doct. & St. Dial.* 1, ch. 30, ed. 1709, p. 105, 107; *Bro. Abr. tit. Assets per disc.* 26; Co. Litt. 374 b.; *Anon. Keilw.* 124 b., Ca. 82; *Earl of Stafford v. Buckley*, 2 Ves. 170, 179. An author's manuscript of a work composed by him, but not published, is, it is probable, not assets for the payment of his debts. In *Atcherley v. Vernon*, 10 Mod. 530, Com. 381, a case before the Court of Chancery, it was inquired by counsel,—“Suppose a man of learning should have the misfortune to die in debt; can the creditors come into this Court, and pray a discovery of all his papers, that they may be printed for the payment of his debts?” A question more doubtful may be, to whom the manuscript shall belong, whether

to the heir or to the personal representative of the author. In *Atcherley v. Vernon*, there were three claimants to some manuscript Reports of Cases in Chancery; namely, the author's heir at law, “as guardian of the reputation of his ancestor;” trustees, who contended that the author had bequeathed the manuscripts to them, under the words “residue of my personal estate;” and the author's widow, who insisted, “that she ought to have them, as included in the devise of household goods and furniture.” The Court, it appears, decided nothing in the affair, because all consented to have them printed under the direction of the Court, without making any profit of them. (10 Mod. 531.) With respect to a book printed and published after the stat. 54 Geo. III. c. 156, it is observable that, by the fourth section of this Act, the sole liberty of printing and reprinting such book for twenty-eight years, and, if the author shall be living at the end of that period, then for the residue of his life, is given to the author, and his assignee or assigns.

(s) *Holmes v. Coghill*, 7 Ves. 499, 12 Ves. 206. See also *Harrington v. Harte*, 1 Cox, 131.

(t) *Burdett v. Willett*, 2 Vern. 638. See *Com. Dig. tit. Chancery*, 2 G. 2, 4th ed., p. 365.

(u) *Maddison v. Andrew*, 1 Ves. 57, 60.

(v) *Randal v. Hearle*, 2 Anstr. 363, 366.

(w) *Lister v. Lister*, 2 Vern. 68, 2 Freem. 102.

(x) *Parker v. Dea*, 2 Ch. Cas. 201; *Earl of Godolphin v. Penneck*, 2 Ves. 271; *Ald-*

the question occurred, whether certain customary lands, held of the manor part of the Duchy of Cornwall, would be assets for the payment of debts, without the act of the tenant to subject them to that payment, Lord Hardwicke left such question undetermined, there being no proof before him, to make it appear whether they were liable to the payment of debts or not. In the same case, his Lordship said, "he took it, that tenant-right estates in the North were subject to debts, though he was not sure of it." And "some at the bar seemed to think otherwise." (y)

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*CHAPTER XVIII.

OF PROBATE OF A WILL; OF LETTERS OF ADMINISTRATION; AND
OF AN INVENTORY.

- SECT. I. *Of Probate of a Will; of Letters of Administration.*
II. *Of an Inventory.*

SECTION I.

OF PROBATE OF A WILL; OF LETTERS OF ADMINISTRATION.

CERTAIN provisions relative to the duty payable on, and to other matters concerning, the probate of a will and letters of administration, are made by the following sections of the statute 55 Geo. III. c. 184.

For better securing the duties on probates of wills and letters of administration, be it enacted, That from and after the 31st day of August, 1815, if any person shall take possession of, and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of 100*l.*, and also a further sum at and after the rate of 10*l.* per centum on the amount of the stamp duty payable on the probate of the will or letters of administration of the estate and effects of the deceased.

[*244] *And be it further enacted, That from and after the expiration of three calendar months from the passing of this Act, no Ecclesiastical Court or person shall grant probate of the will, or letters of administration of the estate and effects, of any person deceased, without first requiring and receiving from the person or persons applying for

rich v. Cooper, 8 Ves. 391, 393, 394. See (y) Earl of Godolphin v. Penneck, 2 Ves. Helley v. Helley, 2 Eq. Cas. Abr. 509, Ca. 4. 271.

the probate or letters of administration, or from some other competent person or persons, an affidavit, or solemn affirmation in the case of Quakers, that the estate and effects of the deceased, for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estates for years of the deceased, whether absolute or determinable on lives, if any, and without deducting any thing on account of the debts due and owing from the deceased, are under the value of a certain sum, to be therein specified, to the best of the deponent's or affirmant's knowledge, information, and belief, in order that the proper and full stamp duty may be paid on such probate or letters of administration; which affidavit or affirmation shall be made before the surrogate, or other person who shall administer the usual oath for the due administration of the estate and effects of the deceased.

And be it further enacted, That every such affidavit or affirmation shall be exempt from stamp duty, and shall be transmitted to the Commissioners of Stamps, together with the copy of the will, or extract or account of the letters of administration, to which it shall relate, by the registrar or other officer of the Court, whose duty it shall be to transmit copies of wills, and extracts or accounts of letters of administration, to the said Commissioners, for the better collection of the duties on legacies and successions to personal estate upon intestacy; and if any registrar, or other officer whose duty it shall be, shall neglect to transmit such affidavit or affirmation to the *said Commissioners of Stamps, as hereby directed, every person so offending shall forfeit the sum [*245] of 50*l*.

And be it further enacted, That from and after the passing of this Act, where any person, on applying for the probate of a will or letters of administration, shall have estimated the estate and effects of the deceased to be of greater value than the same shall have afterwards proved to be, and shall in consequence have paid too high a stamp duty thereon, if such person shall produce the probate or letters of administration to the said Commissioners of Stamps, within six calendar months after the true value of the estate and effects shall have been ascertained, and it shall be discovered that too high a duty was first paid on the probate or letters of administration, and shall deliver to them a particular inventory, and account, and valuation of the estate and effects of the deceased, verified by an affidavit, or solemn affirmation in the case of Quakers, and if it should thereupon satisfactorily appear to the said Commissioners, that a greater stamp duty was paid on the probate or letters of administration than the law required, it shall be lawful for the said Commissioners to cancel and expunge the stamp on the probate or letters of administration, and to substitute another stamp for denoting the duty which ought to have been paid thereon, and to make an allowance for the difference between them, as in the cases of spoiled stamps, or, if the difference be considerable, to repay the same in money, at the discretion of the said Commissioners.

And be it further enacted, That from and after the passing of this Act, where any person, on applying for the probate of a will, or letters of administration, shall have estimated the estate and effects of the deceased to be of less value than the same shall have afterwards proved to be, and shall in consequence have paid too little stamp duty thereon, it shall be

lawful for the said Commissioners of Stamps, on delivery to them of an affidavit, or solemn affirmation, of the value of the estate and effects of the deceased, to cause the probate or letters of *administration [*246] tion to be duly stamped, on payment of the full duty which ought to have been originally paid thereon in respect of such value, and of the further sum or penalty payable by law for stamping deeds after the execution thereof, without any deduction or allowance of the stamp duty originally paid on such probate or letters of administration: Provided always, that if the application shall be made within six calendar months after the true value of the estate and effects shall be ascertained, and it shall be discovered that too little duty was at first paid on the probate or letters of administration; and if it shall appear by affidavit or solemn affirmation, to the satisfaction of the said Commissioners, that such duty was paid in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, and without any intention of fraud, or to delay the payment of the full and proper duty; then it shall be lawful for the said Commissioners to remit the before mentioned penalty, and to cause the probate or letters of administration to be duly stamped, on payment only of the sum which shall be wanting to make up the duty which ought to have been at first paid thereon.

Provided always, and be it further enacted, That in cases of letters of administration, on which too little stamp duty shall have been paid at first, the said Commissioners of Stamps shall not cause the same to be duly stamped in the manner aforesaid, until the administrator shall have given such security to the Ecclesiastical Court or Ordinary, by whom the letters of administration shall have been granted, as ought by law to have been given on the granting thereof, in case the full value of the estate and effects of the deceased had been then ascertained; and also that the said Commissioners of Stamps shall yearly, or oftener, transmit an account of the probates and letters of administration, upon which the stamps shall have been rectified in pursuance of this Act, to the several Ecclesiastical Courts by which the same shall have been granted, together with the value of the estate and effects of the deceased, upon which such rectification shall have proceeded.

[*247] *And be it further enacted, That where too little duty shall have been paid on any probate or letters of administration, in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, if any executor or administrator acting under such probate or letters of administration, shall not, within six calendar months after the passing of this Act, or after the discovery of the mistake or misapprehension, or of any estate or effects not known at the time to have belonged to the deceased, apply to the said Commissioners of Stamps, and pay what shall be wanting to make up the duty which ought to have been paid at first on such probate or letters of administration, he or she shall forfeit the sum of 100*l.*, and also a further sum, at and after the rate of 10*l.* per centum on the amount of the sum wanting to make up the proper duty.

And be it further enacted, That from and after the expiration of three calendar months from the passing of this Act, it shall not be lawful for any Ecclesiastical Court, or person, to call in and revoke, or to accept

the surrender of, any probate or letters of administration, on the ground only of too high or too low a stamp duty having been paid thereon, as heretofore hath been practised; and if any Ecclesiastical Court, or person, shall do so, the Commissioners of Stamps shall not make any allowance whatever for the stamp duty on the probate or letters of administration which shall be so annulled.

And whereas it has happened, in the case of letters of administration on which the proper stamp duty hath not been paid at first, that certain debts, chattels real, or other effects, due or belonging to the deceased, have been found to be of such great value, that the administrator hath not been possessed of money sufficient, either of his own or of [*248] the deceased, to pay the requisite stamp duty, in order to render such letters of administration available for the recovery thereof by law; and whereas the like may occur again, and it may also happen that executors, or persons entitled to take out letters of administration, may, before obtaining probate of the will or letters of administration of the estate and effects of the deceased, find some considerable part or parts of the estate and effects of the deceased so circumstanced as not to be immediately got possession of, and may not have money sufficient, either of their own or of the deceased, to pay the stamp duty on the probate or letters of administration, which it shall be necessary to obtain, Be it therefore further enacted, That from and after the passing of this Act, it shall be lawful for the said Commissioners of Stamps, on satisfactory proof of the facts by affidavit or solemn affirmation, in any such case as aforesaid, which may appear to them to require relief, to cause the probate or letters of administration to be duly stamped, for denoting the duty payable or which ought originally to have been paid thereon, and to give credit for the duty, either upon payment of the before mentioned penalty, or without, in cases of probates or letters of administration already obtained, and upon which too little duty shall have been paid, and either with or without allowance of the stamp duty already paid thereon, as the case may require, under the provisions of this Act; provided, in all such cases of credit, that security be first given by the executors or administrators, together with two or more sufficient sureties, to be approved of by the said Commissioners, by a bond to his Majesty, his heirs, or successors, in double the amount of the duty, for the due and full payment of the sum for which credit shall be given, within six calendar months, or any less period, and of the interest for the same, at the rate of 10*l.* per centum per annum, from the expiration of such period until payment thereof, in case of any default of payment at the time appointed; and such probate or letters of administration being duly stamped in the manner aforesaid, shall be as valid and available as if the proper duty had been at first paid thereon, and the same had been stamped accordingly.

*Provided always, and be it further enacted, That if at the expiration of the time to be allowed for the payment of the [*249] duty on such probate or letters of administration, it shall appear to the satisfaction of the said Commissioners, that the executor or administrator, to whom such credit shall be given as aforesaid, shall not have recovered effects of the deceased, to an amount sufficient for the payment of the duty, it shall be lawful for the said Commissioners to give such further

time for the payment thereof, and upon such terms and conditions, as they shall think expedient.

Provided also, and be it further enacted, That the probate or letters of administration, so to be stamped on credit as aforesaid, shall be deposited with the said Commissioners of Stamps, and shall not be delivered up to the executor or administrator until payment of the duty, together with such interest as aforesaid, if any shall become due; but the same shall nevertheless be produced in evidence by some officer of the Commissioners of Stamps, at the expense of the executor or administrator, as occasion shall require.

And be it further enacted, That the duty, for which credit shall be given as aforesaid, shall be a debt to his Majesty, his heirs, or successors, from the personal estate of the deceased, and shall be paid in preference to and before any other debt whatsoever due from the same estate; and if an executor or administrator of the estate of the deceased shall pay any other debt in preference thereto, he or she shall not only be charged with and be liable to pay the duty out of his or her own estate, but shall also forfeit the sum of 500*l*.

And be it further enacted, That if before payment of the duty, for which credit shall be given in any such case as aforesaid, it shall become necessary to take out letters of administration *de bonis non* of the deceased, it shall also be lawful for the said Commissioners to cause such [*250] letters *of administration *de bonis non* to be duly stamped with the particular stamp provided to be used on letters of administration of that kind, for denoting the payment of the duty, in respect of the effects of the deceased, on some prior probate or letters of administration of the same effects, in such and the same manner as if the duty had been actually paid, upon having the letters of administration *de bonis non* deposited with the said Commissioners, and upon having such further security for the payment of the duty as they shall think expedient, and such letters of administration shall be as valid and available as if the duty, for which credit shall be given, had been paid.

And be it further enacted, in regard to probate of wills and letters of administration, That where any part of the personal estate, which the deceased was possessed of or entitled to, shall be alleged to have been trust property, if the person or persons who shall be required to make any affidavit or affirmation relating thereto, conformably to the provisions of the Act of the 48th year of his Majesty's reign [s. 36, 37,] shall reside out of England, such affidavit or affirmation shall and may be made by any person duly commissioned to take affidavits by the Court of Session or Court of Exchequer in Scotland, or before one of his Majesty's justices of the peace in Scotland, or before a Master in Chancery, ordinary or extraordinary, in Ireland, or before any judge or civil magistrate of any other country or place, where the party or parties shall happen to reside; and every such affidavit or affirmation shall be as effectual, as if the same had been made before a Master in Chancery in England, pursuant to the directions of the said last mentioned Act.

Provided always, and be it further enacted, That where it shall be proved by oath or proper vouchers to the satisfaction of the said Commissioners of Stamps, that an executor or administrator hath paid debts due and owing from the deceased, and payable by law out of his or her personal or moveable estate, to such an amount as being deducted from

the amount or value of the estate and effects of the deceased, [*251]
 *for or in respect of which a probate or letters of administration, or a compensation of a testament, testamentary or dative, shall have been granted after the 31st day of August, 1815, or which shall be included in any inventory exhibited and recorded in a Commissary Court in Scotland as the law requires, after that day, shall reduce the same to a sum, which, if it had been the whole gross amount of value of such estate and effects, would have occasioned a less stamp duty to be paid on such probate or letters of administration, or confirmation or inventory, than shall have been actually paid thereon, under and by virtue of this Act, it shall be lawful for the said Commissioners to return the difference, provided the same shall be claimed within three years after the date of such probate or letters of administration or confirmation, or the recording of such confirmation as aforesaid; but where, by reason of any proceeding at law or in equity, the debts due from the deceased shall not have been ascertained and paid, or the effects of the deceased shall not have been recovered and made available, and in consequence thereof the executor or administrator shall be prevented from claiming such return of duty as aforesaid within the said term of three years, it shall be lawful for the Commissioners of the Treasury to allow such further time for making the claim, as may appear to them to be reasonable under the circumstances of the case.

A schedule annexed to the same statute contains the following duties on the probates of wills and letters of administration.

DUTY.
 £. s. d.

Probate of a will, and letters of administration with a will annexed, to be granted in England; where the estate and effects, for or in respect of which such probate, or letters of administration, shall be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, shall be—

Above the value of	£20	and under the value of	£100	-	0	10	0
Of the value of	100	and under the value of	200	-	2	0	0
-	200	-	300	-	5	0	0
-	300	-	450	-	8	0	0
-	450	-	600	-	11	0	0
-	600	-	800	-	15	0	0
-	800	-	1000	-	22	0	0
-	1000	-	1500	-	30	0	0
-	1500	-	2000	-	40	0	0
-	2000	-	3000	-	50	0	0
-	3000	-	4000	-	60	0	0
-	4000	-	5000	-	80	0	0
-	5000	-	6000	-	100	0	0
-	6000	-	7000	-	120	0	0
-	7000	-	8000	-	140	0	0
-	8000	-	9000	-	160	0	0

				£	s.	d.
Of the value of £9000 & under the value of £10,000	-	-	-	180	0	0
- 10,000	-	-	12,000	200	0	0
- 12,000	-	-	14,000	220	0	0
- 14,000	-	-	16,000	250	0	0
- 16,000	-	-	18,000	280	0	0
- 18,000	-	-	20,000	310	0	0
- 20,000	-	-	25,000	350	0	0
- 25,000	-	-	30,000	400	0	0
- 30,000	-	-	35,000	450	0	0
- 35,000	-	-	40,000	525	0	0
- 40,000	-	-	45,000	600	0	0
- 45,000	-	-	50,000	675	0	0
- 50,000	-	-	60,000	750	0	0
- 60,000	-	-	70,000	900	0	0
- 70,000	-	-	80,000	1050	0	0
- 80,000	-	-	90,000	1200	0	0
- 90,000	-	-	100,000	1350	0	0
- 100,000	-	-	120,000	1500	0	0
- 120,000	-	-	140,000	1800	0	0
- 140,000	-	-	160,000	2100	0	0
- 160,000	-	-	180,000	2400	0	0
- 180,000	-	-	200,000	2700	0	0
- 200,000	-	-	250,000	3000	0	0
- 250,000	-	-	300,000	3750	0	0
- 300,000	-	-	350,000	4500	0	0
- 350,000	-	-	400,000	5250	0	0
- 400,000	-	-	500,000	6000	0	0
- 500,000	-	-	600,000	7500	0	0
- 600,000	-	-	700,000	9000	0	0
- 700,000	-	-	800,000	10,500	0	0
- 800,000	-	-	900,000	12,000	0	0
- 900,000	-	-	1,000,000	13,500	0	0
- 1,000,000 and upwards	-	-	-	15,000	0	0

Letters of administration, without a will annexed, to be granted in England; where the estate and effects, for or in respect of which such letters of administration shall be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, shall be—

Above the value of £20 and under the value of £50	-	-	-	0	10	0
Of the value of 50	-	-	100	1	0	0
- 100	-	-	200	3	0	0
- 200	-	-	300	8	0	0
- 300	-	-	450	11	0	0
- 450	-	-	600	15	0	0
- 600	-	-	800	22	0	0
- 800	-	-	1000	30	0	0
- 1000	-	-	1500	45	0	0

					£	s.	d.
Above the value of £1500 and under the value of £2000 -					60	0	0
-	2000	-	-	3000	75	0	0
-	3000	-	-	4000	90	0	0
-	4000	-	-	5000	120	0	0
-	5000	-	-	6000	150	0	0
-	6000	-	-	7000	180	0	0
-	7000	-	-	8000	210	0	0
-	8000	-	-	9000	240	0	0
-	9000	-	-	10,000	270	0	0
-	10,000	-	-	12,000	300	0	0
-	12,000	-	-	14,000	330	0	0
-	14,000	-	-	16,000	375	0	0
-	16,000	-	-	18,000	420	0	0
-	18,000	-	-	20,000	465	0	0
-	20,000	-	-	25,000	525	0	0
-	25,000	-	-	30,000	600	0	0
-	30,000	-	-	35,000	675	0	0
-	35,000	-	-	40,000	785	0	0
-	40,000	-	-	45,000	900	0	0
-	45,000	-	-	50,000	1010	0	0
-	50,000	-	-	60,000	1125	0	0
-	60,000	-	-	70,000	1350	0	0
-	70,000	-	-	80,000	1575	0	0
-	80,000	-	-	90,000	1800	0	0
-	90,000	-	-	100,000	2025	0	0
-	100,000	-	-	120,000	2250	0	0
-	120,000	-	-	140,000	2700	0	0
-	140,000	-	-	160,000	3150	0	0
-	160,000	-	-	180,000	3600	0	0
-	180,000	-	-	200,000	4050	0	0
-	200,000	-	-	250,000	4500	0	0
-	250,000	-	-	300,000	5625	0	0
-	300,000	-	-	350,000	6750	0	0
-	350,000	-	-	400,000	7875	0	0
-	400,000	-	-	500,000	9000	0	0
-	500,000	-	-	600,000	11,250	0	0
-	600,000	-	-	700,000	13,500	0	0
-	700,000	-	-	800,000	15,750	0	0
-	800,000	-	-	900,000	18,000	0	0
-	900,000	-	-	1,000,000	20,250	0	0
-	1,000,000 and upwards	-	-	-	22,500	0	0

In a late case, where a testator, who was an English subject, and resident in England, died possessed of certain *rentes*, or sum *of money, which was part of the public debt of France, it [*255] was decided that this property in a foreign country was not liable to the probate duty, although the executor sold it, and brought the produce into England.(a)

(a) Attorney General v. Dimond, 1 Crompt. & Jerv. 356, 1 Tyrwh. 243.

SECTION II.

OF AN INVENTORY.

THE 4th section of the statute 21 Henry VIII., c. 5, requires an executor or administrator to make a true and perfect inventory of "all the goods, chattels, wares, merchandises, as well moveable as not moveable, whatsoever," that were of the person deceased; one part of which inventory is directed to be delivered to the bishop, ordinary, or other person, having power to take probate of testaments, and the other part to remain with the executor or administrator. The 5th section of the same statute provides, "that if the person so deceased will, by his testament or last will, any lands, tenements, or hereditaments, to be sold, the money thereof coming, nor the profits of the said lands for any time to be taken, shall not be accounted as any of the goods or chattels of the person deceased."

On an inventory, Sir John Nicholl observes, "The Canons require an inventory to be exhibited, even before probate is granted; and this was the old practice of this Court [Prerogative Court of Canterbury]; and, indeed, is still the practice in some country jurisdictions. The statute 21 Henry VIII., c. 5, s. 4, requires executors and administrators to exhibit inventories, as part of their duty, without any proceedings to call upon them to do so. The modern practice, however, is certainly not to render an account, unless it shall be called for; but the executor must remember, that he has bound himself by his oath to render a just account, when he [*256] is by law required. The Court may, and in some instances does, for the protection and security of the parties interested, require *ex officio* that an inventory shall be exhibited; and though the Court does not exact this in all cases, still it always will, where a party, having an interest in the property, applies for it."(b)

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*CHAPTER XIX.

OF FUNERAL AND TESTAMENTARY EXPENSES.

IMMEDIATELY on the death of a testator, the first duty which arises, and which is owing, at least to society, (a) if not to the deceased himself, is to cause the body to be buried. (b) And this duty is so much acknow-

(b) *Phillips v. Bignell*, 1 Phillim. 240. See also 2 Add. 236. Late cases on an inventory are, *Butler v. Butler*, 2 Phillim. 37; *Reeves v. Freeling*, ib. 56; *Barclay v. Marshall*, ib. 188; *Griffiths v. Bennett*, ib. 364; *Kenny v. Jackson*, 1 Hagg. 105; *Pitt v. Woodham*, ib. 247; *Williams' case*, 3 Hagg. 217; *Ritchie v. Rees*, 1 Add. 144; *Gale v. Luttrell*, 2 Add. 234; *Paul v. Nettlefold*, ib. 237; *Hunter v. Byrn*, ib. 311; *Telford v.*

Morrison, ib. 319; *Brogden v. Brown*, ib. 336. Generally on an inventory, see *Swinh.* part 6, sections 6, 7, 8, 9, 10; *Wentw. Off. Ex.* ch. 4; *God. Orph. Leg.* part 2, ch. 21; 4 *Burn's Eccl. L. tit. Wills*, s. 5, 7th ed. p. 294. And for a form of an inventory, see 4 *Burn's Eccl. L.* 7th ed. p. 491.

(a) *Wentw. Off. Ex.* ch. 12; 3 *Y. & Jerv.* 34, 36.

(b) 3 *Inst.* 202; 3 *Y. & Jerv.* 34, 36.

ledged by the law, that it appears a person, who so far administers the estate of the deceased, as to cause him to be buried, does not by this act make himself an executor *de son tort*.(c) "Giving directions for the funeral," says Sir R. P. Arden, "is only an act of charity, and will not make a man executor. God forbid it should; for then the deceased could not be buried by any one, from the apprehension of being involved as executor."(d) Before any person, as an executor named in the will, or other party, has taken on himself the administration of the testator's estate, singular as the circumstance may appear, it is, perhaps, down to the present day undecided, who the person is, on whom the legal (as distinguished from any filial, parental, or other moral) duty falls, to cause the body to be buried.(e) Where there is a will, although any one has so far power to cause the interment of the body, that he will not, by exercising this power, make himself an executor *de son tort*, yet it appears that "until something is done upon the will, no one has [*258] authority even to bury."(f) But after the executor has taken on himself the administration of the testator's estate, and, by greater reason, therefore, after he has proved the will, it seems that the law throws on him the obligation to bury the testator.(g)

The law authorizes an executor to defray a certain expense, attendant on the burying of the deceased, before he pays the cost of proving the will;(h) and, as the expense of proving the will is payable before debts owing by the testator,(i) the law empowers the executor to pay a certain expense for the funeral, before he discharges any debt owing by the deceased,(j) even if it be a debt due to the Crown.(k)

When an executor has paid the expense of his testator's funeral, and after this payment, and the cost of proving the will, there is a deficiency of assets to satisfy the testator's debts, then, as against creditors, the sum which, by a Court of Law, is allowed to the executor, on account of the funeral expenses, seems to have been different at different periods.(l) In one case, it appears 150*l.* was charged for the testator's funeral, "out of which, Holt said, at least 140*l.* ought to be deducted, for 10*l.* is enough to be allowed for the funeral of one in debt." And in the same case it is added, "Longueville said, that Baron Powell, in his circuit, would al-

(c) Bro. Abr. tit. *Administrators*, pl. 6; 2 Dyer, 166 b.; Keilw. 63 a.; 11 Vin. Abr. 207, pl. 24; 2 Bl. Com. 507.

(d) *Harrison v. Rowley*, 4 Ves. 216.

(e) Generally speaking, a husband is under a "strict legal necessity" of burying his wife. (*Jenkins v. Tucker*, 1 H. Bl. 90.) And probably, in general cases, this duty falls on him, notwithstanding the wife is possessed of an estate to her separate use; although, in particular instances, he may have the right to throw her funeral expenses on that estate. (*Bertie v. Lord Chesterfield*, 9 Mod. 31; *Poole v. Harrington*, Toth. tit. *Feme Covert*, ed. 1820, p. 97; *Gregory v. Lockyer*, 6 Madd. 90.) On a father's duty to bury his daughter, see 1 H. Bl. 93.

(f) *Georges v. Georges*, 18 Ves. 296.

(g) 3 Atk. 119; 3 Campb. 299; 3 Y. & Jerv. 36, 38; *Shepp. Touchet*. 476; 2 Bl. Com. 508.

(h) Doct. & St. Dial. 2 ch. 10, ed. 1709, p. 164; Bro. Abr. tit. *Executors*, pl. 172; 3 Inst. 202; *Wentw. Off. Ex.* ch. 12; 2 Bl. Com. 508, 511.

(i) *Wentw. Off. Ex.* ch. 12; 2 Bl. Com. 511; 4 Burn's Eccl. L. 348.

(j) Doct. & St. Dial. 2, ch. 10; Bro. Abr. tit. *Executors*, pl. 172; 3 Inst. 202; 8 Co. 136; *Fleta*, lib. 2, cap. 57, ed. 1685, p. 126; 1 Rol. Abr. 926, S. pl. 1; *Wentw. Off. Ex.* ch. 12; 11 Vin. Abr. 300, S. a. pl. 1; 3 Campb. 299; 2 Bl. Com. 508, 511; *Atkins v. Hill*, Cowp. 284, 288.

(k) *Wentw. Off. Ex.* ch. 12; 2 Bl. Com. 511; *The King v. Wada*, 5 Price, 621, 627. See *Harcock v. Wrenham*, 1 Brownl. & G. 76.

(l) 3 Atk. 119; Bull. N. P. 143; *Smith v. Davis*, 2 Selw. N. P. 8th ed. 780 n.

low but eleven shillings and sixpence in the like case, which, he said, was all the necessary charge.”(m) And in Shelley’s case, Holt, C. J., appears to have held, “That for strictness, *no funeral expenses are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers’ fees; but not for pall or ornaments.”(n) In the *King v. Wade*, Richards, C. B., said, “No doubt funeral expenses are to be preferred, even to a debt due to the Crown; but we ought to know from the plea, what those expenses were, and to be able to judge whether they were reasonable and necessary.”(o) According to a late case, *Hancock v. Podmore*, “The rule, as against a creditor, is, that no more shall be allowed for a funeral than is necessary. In considering what is necessary, regard must undoubtedly be had to the degree and condition in life of the party.” And in the same case, where an action was brought by a bond creditor against the executrix of a person, who had been a captain in the army, and at the time of his death was on half-pay, and the executrix had paid 79*l.* for funeral expenses, the Court of King’s Bench decided, “that 79*l.* is a larger sum than ought to be allowed, as against a creditor, for the funeral of a person in the degree and condition of life of this testator.” And the Court appears to have expressed an opinion, that, in the particular case, 20*l.* only ought to be allowed.(p)

In *Offley v. Offley*, a cause that occurred in a Court of Equity, and which, it appears, “came on amicably,” “there had been 600*l.* laid out in Mr. O.’s funeral, which the Court decreed should be a debt to affect the trust estate; Mr. O. being a man of a great estate and reputation in his country, and being buried there; but if he had been buried elsewhere, it seemed his funeral might have been more private, and the Court would not have allowed so much.”(q) *Stag v. Punter*, which also came before a Court of Equity, is thus reported,—“Upon exceptions to a Master’s report for not allowing 60*l.* for the testator’s funeral, Lord Chancellor [Hardwicke]—“At law, where a person dies insolvent, the rule is, that no more shall be allowed for a funeral than is necessary; at first, [*260] only 40*s.*, then 5*l.*, and at last, 10*l.* I have often thought it a hard *rule, even at law, as an executor is obliged to bury his testator, before he can possibly know whether his assets are sufficient to pay his debts. But this Court is not bound down by such strict rules; especially where a testator leaves great sums in legacies, which is a reasonable ground for an executor to believe the estate is solvent. As this is the case here, I am of opinion that 60*l.* is not too much for the funeral expense, especially as the testator had directed his corpse should be buried at a church thirty miles from the place of his death; and, besides, there is still another estate to be sold, so that it is not clear that there will be any deficiency; and, on these circumstances, his Lordship allowed the exception to the Master’s report.”(r) In *Stacpoole v. Stacpoole*, an administrator expended 1200*l.*, or, as it appears in another place, 1237*l.*, in the intestate’s funeral; and two of the next of kin seem to have been concerned in these expenses, for the purpose of gaining some benefit by

(m) Anon. Comberb. 342.

(n) 1 Salk. 296, Cas. T. Holt, 306.

(o) 5 Price, 621, 627.

(p) 1 Barn. & Adol. 260.

(q) Prec. Ch. 27.

(r) 3 Atk. 119.

it as tradesmen. But the Master and the Court thought that 200*l.* was a sufficient sum for the funeral, and the Court so decided.^(s)

Where creditors were not concerned, there has been at law recovered for funeral expenses, in one case, 270*l.*,^(t) and in another instance, 140*l.* 15*s.*^(u)

When there is a deficiency of assets to pay the testator's debts, an executor, who has, in payment of the funeral expenses, exceeded the sum, which, as against creditors, a Court of Law will, in the particular case, allow him, is guilty of a *devastavit*, and he must pay the excess out of his own pocket.^(v)

An action may, in some cases, be sustained against an executor, on his implied promise to pay the funeral expense of his testator. In *Tugwell v. Heyman*, executors were held to be liable for such expense, on their implied promise to pay it; the circumstances of the case being, that the defendants, the executors, had given no orders whatever to the plaintiff, or to any one else, to furnish the funeral, which, it was allowed, was conducted in a "manner suitable to the testator's degree and circumstances; the plaintiff's charge was fair and reasonable, [*261] and the defendants had sufficient assets to pay it."^(w) A similar action was sustained against an executor, on his implied promise, in *Rogers v. Price*, where the circumstances were, that there was no evidence to shew the plaintiff, the undertaker, acted upon the credit of any other person; the funeral was, it was admitted, suitable to the degree of the deceased, a funeral such as in ordinary cases would be required; and the executor possessed assets sufficient to defray the plaintiff's demand.^(x) On counsel stating, in *Hancock v. Podmore*, that "an executor is liable for the expenses of a decent funeral, even though the testator be buried without the authority of his executor," Bailey, J., interposed, and said, "only where the funeral is suitable, and the executor has assets in his hands."^(y)

Johnson v. Baker was an action of *assumpsit* for goods sold. The defendant was executor of W., and the demand was for mourning furnished to the widow and family of the defendant's testator. It was urged for the plaintiff, that this demand might come under the description of funeral expenses, which an executor was bound to pay. Best, C. J., was of opinion, that it was not a funeral expense, and that the executor could not claim against the estate, if compelled to pay.^(z)

Before an executor discharges any debt owing by his testator, the law authorises him to pay the cost of proving the will.^(a) And it appears that under the plea of *plene administravit* to an action of *assumpsit*, an administrator may prove the expenses of administration, namely, the proctor's bill for taking out letters of administration, and shew that he has retained money to that amount.^(b)

(s) 4 Dow P. C. 209, 214, 227.

(t) *Bertie v. Lord Chesterfield*, 9 Mod. 31.

(u) *Jenkins v. Tucker*, 1 H. Bl. 90, 94, n.

(v) *Shepp. Touchst.* 476; 2 Bl. Com. 508.

(w) 3 Campb. 298.

(x) 3 Y. & Jerv. 28. The sum recovered was 30*l.* See *Arlot v. Churchland*, cited ib. 32, 37, 38. The authorities in this and

the last note seem to be at variance with the opinion of Holt, C. J., in *Anon.* 12 Mod. 256, *Cas. T. Holt*, 309.

(y) 1 Barn. & Adol. 262.

(z) 2 Carring. & P. 207.

(a) *Wentw. Off. Ex. ch.* 12; 2 Bl. Com. 511; 4 Burn's Eccl. L. 348; 1 Sim. & St. 461; *Hancock v. Podmore*, 1 Barn. & Adol. 260.

(b) *Gillies v. Smither*, 2 Stark. 528. On retaining to pay the expense of probate of

[*262] *In a case, where a testator provided a particular fund to pay debts, funeral and testamentary expenses, and the will occasioned a suit in equity, Sir J. Leach decided, that the costs of the suit were not payable out of that fund, the expression "testamentary expenses" being confined to the usual charges of probate, &c.; and that the costs must therefore be paid out of the residuary estate.(c)

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*CHAPTER XX.

OF RETAINER BY EXECUTOR, HEIR AND DEVISEE.

SECT. I. *Of Retainer by Executor.*

II. *Of Retainer by Heir or Devisee.*

SECTION I.

OF RETAINER BY EXECUTOR.

AN executor, to whom his testator dies indebted, is entitled to pay himself in preference to all other creditors, whose debts are of equal degree with, or of lesser degree than, his own.(a) To this end he may retain legal assets, as leaseholds for years,(b) or chattels personal, to satisfy the whole of his own greater,(c) or equal debt;(d) and therefore

a will, or other cost of administration, see Jenk. Cent. C. 4, Ca. 88, and Anon. Mos. 328; and on retaining to pay funeral expenses, see Anon. Mos. 328, and the King v. Wade, 5 Price, 621.

(c) Brown v. Groombridge, 4 Madd. 495.

(a) 10 Mod. 496, 497.

(b) Shelley v. Sackville, And. 24, Mo. 2, Ca. 3, Benl. 11, Ca. 8; Baker v. Berisford, 1 Lev. 154, 1 Keb. 285.

(c) Williamson v. Norwich, 1 Rol. Abr. 923; Whitehead v. Sampson, 1 Freem. 265.

(d) 20 Hen. VII. 5; Keilw. 63 a.; 1 Rol. Abr. 922, L. 1; 1 Salk. 304; 11 Mod. 40, 41; Willes, 188; 3 Barn. & C. 322; 3 Bl. Com. 18; Woodward v. Lord Darcy, Plowd. 184; Bright v. Woodward, 1 Vern. 3rd ed. 369, n. An administrator also may retain, 1 Rol. Abr. 922, L.; Charlton v. Low, 3 P. W. 328, 331; Want v. Swayne, Willes, 185; and although he be administrator *durante minore etate*, Roskelley v. Godolphin, T. Raym. 483; Briers v. Goddard, Hob. 250; 4 Ves. 764; or administrator *de bonis non* to the debtor, Weeks v. Gore, 3 P. W. 184, n.; or administrator for the use of a lu-

natic during the lunacy, Franks v. Cooper, 4 Ves. 763. Of retainer in cases of principal and surety. see Anon. Godb. 149, Ca. 194, 11 Vin. Abr. 263, 265; Anon. 11 Vin. Abr. 265, pl. 9; Sprignall v. Delawne, 2 Vern. 36; Silk v. Prime, 1 Dick. 384, 385; Bathurst v. De la Zouch, 2 Dick. 460. Of pleadings in retainer, see 2 Rol. Abr. 684, pl. 8; 11 Vin. Abr. 266, tit. Executors, M. a. 2; Warner v. Wainsford, Hob. 127; Wainford v. Warner, 1 Brownl. & G. 80; Fox v. Andrew, 1 Brownl. & G. 52; Caverly v. Ellison, T. Jones, 23; Baker v. Berisford, 1 Lev. 154; Page v. Denton, 1 Ventr. 354; Atkinson v. Rawson, 1 Mod. 208; Prince v. Rowson, 2 Mod. 51; Marriott v. Thompson, Willes, 186; Picard v. Brown, 6 Durn. & E. 550; Harry v. Jones, 4 Price, 89; Thompson v. Thompson, 9 Price, 464. That an executor or administrator may either plead his right to retain, or give it in evidence under the plea *plene administravit*, see Bull v. Fankester, Winch, 19; Bond v. Green, 1 Brownl. & G. 75, Godb. 216; Stonehouse v. Ilford, Com. 145; Anon. Jenk. Cent. C. 4, Ca. 88; Plumer v. Marchant, 3

against judgment, bond, or simple *contract creditors, his own debts by judgment;(e) against bond or simple contract [*264] creditors, his own debts by bond;(f) against a creditor for rent, his own debt by bond;(g) and against simple contract creditors, his own debts by simple contract.(h) This privilege is allowed him in equity,(i) as well as at law. The principle is, that the executor cannot sue himself.(j)

In *Woodward v. Lord Darcy*, the Court of Common Pleas expressed an opinion, that an executor, to whom his testator is indebted by bond, in which the heir is bound, cannot retain *goods for part of [*265] his debt, and for the rest have an action against the heir; for he cannot apportion his debt; but he ought to retain goods for the whole, or have an action for the whole against the heir.”(k) Where, however, the assets are insufficient to pay his whole debt, he may retain all of them in part satisfaction of it.(l) A learned writer states, that in *Hopkinson v. Leech*, 7 May, 1819, Sir J. Leach, V. C., was of opinion, that an executor may retain a debt, although it be more than six years old; but that his Honor directed the opinion of a Court of Law to be taken.(m)

The privilege, which an executor enjoys to retain for his own debts, is confined to debts of greater degree than, or of equal degree with, those of other creditors,(n) and does not extend to entitle the executor to retain for his own debt against a creditor, whose debt is of higher degree than that of the executor.(o) And therefore he cannot for his own

Burr. 1380; *Loane v. Casey*, 2 W. Bl. 965; *Gillies v. Smither*, 2 Stark. 529. That an executor may not, to the prejudice of legatees, retain assets in discharge of his own legacy, but must abate in proportion, see *Butler v. Wallis*, 2 Freem. 134; *Fretwell v. Stacy*, 2 Vern. 434; *Attorney General v. Robins*, 2 P. W. 25; *Heron v. Heron*, 2 Atk. 171. Generally on retainer of assets, see 1 Rol. Abr. 922, L., 923, M., 11 Vin. Abr. 261—267, 269—271, 3 Danv. Abr. 385—387.

(e) *Vaughan v. Browne*, 2 Stra. 1106.

(f) *Cockcroft v. Black*, 2 P. W. 298; *Merriott v. Thompson*, Willes, 186.

(g) *Gage, or Cage, v. Acton*, 1 Salk. 325, 1 Ld. Raym. 515, Com. 67; *Stonehouse v. Ilford*, Com. 145.

(h) 1 Ventr. 199; *Vaugh.* 97; *Bathurst's case*, 2 Ventr. 40; *Sloddall v. Bowerbank*, 1 Rol. Abr. 923, 11 Vin. Abr. 262; *Charlton v. Low*, 3 P. W. 331. From the report of the last case, it might perhaps be inferred, that the administratrix was allowed to be paid before other simple contract creditors, out of the produce of the real estate decreed to be sold for the satisfaction of debts. By the decree her preference in payment is confined to the intestate's personal estate. The words are—“And so far as it shall appear that the said Samuel Lowe received assets of the said Henry Lowe for the payment of the said legacy, the said defendant, Susanna Lowe, is to be considered as a creditor of the said Samuel Lowe by simple contract; and is to be at liberty to retain sufficient of the person-

al estate of the said Samuel Lowe to make satisfaction for what shall be found due to her for her said legacy and interest, preferable to any other creditor by simple contract, but not in prejudice to any creditor of a superior nature.” *Reg. B.* 1734, A. 294.

(i) 1 P. W. 296; *Cockcroft v. Black*, 2 P. W. 298; *Robinson v. Cumming*, 2 Atk. 409. And a personal representative executor or administrator, may retain after a decree for an account in a creditor's suit, and also out of assets come to his hands after such decree. *Nunn v. Barlow*, 1 Sim. & St. 588.

(j) *Plowd.* 185; *Willes*, 188; 3 *Burr.* 1384; 2 W. Bl. Rep. 968; 3 Bl. Com. 18. *Chapman v. Turner*, 11 Vin. Abr. 72, 2 Eq. Cas. Abr. 426. On the doctrine, that by operation of law, the property of the testator's goods is altered, and vested in the executor as his own proper goods in satisfaction of his debt, see *Plowd.* 185 a.; 1 *Anders.* 24, Ca. 50; 3 *Bulstr.* 7; 1 *Rol. Rep.* 129; *Bro. Abr. tit. Executors*, pl. 116; *Ahon. Keilw.* 58 a., Ca. 2, 61 b., Ca. 2, 63 a., 64 a.; *Jenk. Cent. C.* 4, Ca. 88; *Wentw. Off. Ex. ch.* 2, 14th ed. p. 77.

(k) *Plowd.* 185 a. See also *Wentw. Off. Ex. ch.* 2, 14th ed. p. 78.

(l) *Stonehouse v. Ilford*, Com. 145; *Robinson v. Cumming*, 2 Atk. 411.

(m) 1 *Madd. Prin. & Pr. of Ch.* 583.

(n) 1 Salk. 326; 1 Ld. Raym. 515, 516; 1 P. W. 296; 3 P. W. 331; *Willes*, 188; 3 *Burr.* 1384; 3 *Ves. & B.* 197.

(o) 1 Ld. Raym. 515; 3 Bl. Com. 19.

bond debt retain against a creditor by judgment at law, (p) or decree in equity, (q) or for his own simple contract debt against a creditor by bond. (r)

If an executor pays out of his own money debts of the testator, he may, to reimburse himself, retain assets to the amount of that payment. (s) [*266] And this retainer he may make, if, instead of paying *the debt, he gives his bond to pay it. (t) Also an executor may, it should seem, retain in satisfaction of a debt owing to his wife. (u) If there are two executors, and one of them with his own money pays debts of the testator, he may to the amount so paid retain against his co-executor. (v) But if a testator dies indebted to his executor, it may perhaps be stated, that, if at law he may retain against his co-executor, who is a creditor in equal degree, (w) yet probably he cannot do this in equity, where, it should seem, both debts are to be discharged in proportion. (x) It is decided, that if two bond creditors take joint letters of administration, one of them cannot in equity retain against the other; but the retainer of the one administrator is there considered as the retainer of the other, and most enure for their mutual benefit, in the discharge of the debts of both in proportion. (y)

He who is executor of an executor, and who is also the executor of the first testator, may retain such first testator's assets in satisfaction of a debt, by such first testator owing either to this executor personally, or to him as the executor of his own immediate testator. A. the executor of B., executor of C., may, if A. is executor of C., retain C.'s assets in satisfaction of a debt owing by C. to A.; and in satisfaction of a debt owing by C. to B. (z) But A., the executor of B., executor of C., has not capacity to retain C.'s assets in satisfaction of a debt owing by C. to B., if A. is not also the executor of C.; which he may not be; as if a co-executor of the will of C. survived B. (a) If A. is indebted to B. by bond,

(p) *Burnet v. Holden*, T. Raym. 210, 1 Lev. 277, 2 Keb. 549; *Thomason, or Thompson, v. Woods*, 3 Lev. 218, 3 Salk. 65.

(q) *Stasby v. Powell*, 1 Freem. 333; where, in ed. 1742, the sense requires the word *not* to be supplied.

(r) *Musson v. May*, 3 Ves. & B. 194.

(s) *Plowd.* 186; 1 *Rol. Rep.* 129; 1 *Rol. Abr.* 923, M. 2; *Bro. Abr. tit. Executors*, 116; *Keilw.* 64 a.; *Jenk. Cent. C.* 4, Ca. 88; *Willes*, 188; 4 *Durn. & E.* 640; *Anon.* 2 *Dyer*, 2 a., pl. 3; *Langton v. Dive*, cited *Plowd.* 186; *Cleydon, or Claydon, v. Spenssar*, Mo. 2, *Benl.* 11 ed. 1689; *Shelley v. Sackville*, 1 *And.* 24, Mo. 2, Ca. 3, *Benl.* 11, ed. 1689, Ca. 8; *Anon.* 20 H. VII., cited *Keilw.* 59 b.; *Baker v. Berisford*, 1 *Lev.* 154. On an executor's claim to interest on his own money, laid out by him in payment of the testator's debts, see *Macarte v. Gibson*, *Sel. Ca. Ch.* 50. On an executor's redeeming out of his own money property pledged by his testator, and the executor's right to retain it, see *Bro. Abr. tit. Administ.* 51, tit. *Executors*, 179; 1 *Rol. Abr.* 923, M. 1; 2 *Rol. Abr.* 684, pl. 7; *Jenk. Cent. C.* 4, Ca.

88; 11 *Vin. Abr.* 263; *Anon.* 1 *Dyer*, 2 a., pl. 3; *Anon. Keilw.* 58 a., Ca. 2, 61 b., Ca. 2. See also *Yelv.* 178.

(t) *Martin v. Whipper, Cro. Eliz.* 114; *Stampe v. Hutchins, Cro. Eliz.* 120, 1 *Leon.* 111, Mo. 260, 1 *Dyer*, 2 a., pl. 3, n.; *Briers v. Goddard*, *Hob.* 250; *Anon. Gouldsb.* 79, Ca. 15.

(u) *Atkinson v. Rawson*, 1 *Mod.* 208; *Prince v. Rowson*, 2 *Mod.* 51; *Briers v. Goddard*, *Hob.* 250.

(v) 1 *Rol. Abr.* 923, L. 9.

(w) 37 H. VI. 30, pl. 11; 20 H. VII. 5, pl. 14; *Keilw.* 63 a.; 1 *Rol. Abr.* 923, L. pl. 10; 11 *Vin. Abr.* 72, 262, pl. 10; 2 *Eq. Cas. Abr.* 426; 3 *Bl. Com.* 19.

(x) 11 *Vin. Abr.* 262, pl. 10; 3 *Bl. Com.* 19.

(y) *Chapman v. Turner*, 11 *Vin. Abr.* 72, 2 *Eq. Cas. Abr.* 426, 450, in marg., and 464 in marg., 9 *Mod.* 5th ed. 268.

(z) *Hopton v. Dryden*, *Proc. Ch.* 180, 2 *Eq. Cas. Abr.* 450; *Thomson v. Grant*, 1 *Russ.* 540, n.; *Cock v. Cross*, 2 *Lev.* 73.

(a) *Hopton v. Dryden*, *Proc. Ch.* 180, 2 *Eq. Cas. Abr.* 450.

and B. makes C. his executor; and A. also makes C. his executor, then C. may retain the assets of A. in satisfaction *of the debt owing by A. to C., as the executor of B.(b) If A. is indebted [*267] to B. and to C. by several bonds, and dies, and D. takes administration, and afterwards B. makes D. his executor, and dies, D. may retain assets which he has as administrator to A., to satisfy the debt due to him as executor to B.(c) If A., indebted by one bond to B., and by another bond to C., dies, leaving C. and D. his executors; and D. renounces; and C., buries the testator, and intermeddles with his personal estate, but dies before he has proved the will, and before he has expressly declared whether he would or would not retain for his debt, and makes E. his executor; it was, in *Croft v. Pyke*, left undecided, whether as C. had the power of retaining out of the assets, so the same being in his hands it amounted to a retainer, and consequently whether C.'s bond ought to be allowed in the account before the bond of B.(d) On the subject of election to retain, the following case of *Weeks v. Gore* had occurred some years previously to the one last mentioned. A. lent money on bond to B., who dying intestate, C. took out administration to him; after which C. dying, A. took out administration *de bonis non*, &c. to B. and it was determined that A. might, out of the assets of B., retain for such bond debt contracted before he took out administration. And though A. happened to die before he had made any election in what particular effects he would have the property altered, yet the Court said, it must be presumed he would elect to have his own debt paid first; and, this being presumed, there would remain no difficulty as to altering the property; for as the executors of A. were to account for the assets of B., they must on the account, deduct the amount of the money lent by A. to B.(e)

An administratrix has been held to be entitled to retain, in satisfaction of a debt created by a bond, which, before her marriage, was by her husband given to herself, and made on condition to *leave to her 1000*l.* if she survived him.(f) There are also several [*268] cases, wherein an executrix has been allowed to retain assets, in satisfaction of a debt payable under a bond given to a trustee to secure to her the payment of that money. These cases partake of the nature of the one last mentioned; with this difference, that here the bond is not given to the wife herself, but to a trustee for her; one instance being where the condition of the bond was to pay,(g) and others to leave,(h) to her a certain sum of money. And where before marriage a husband covenanted with a trustee that, in case the wife survived him, his executors or administrators should pay to the trustee 400*l.*, in trust for the wife, and the husband died in the lifetime of the wife, and she took out administration; it was determined she was entitled to retain in satisfaction of that sum,

(b) *Fryer v. Gildridge*, Hob. 10.

(c) *Burnet v. Dixe*, 1 Rol. Abr. 922, 11 Vin. Abr. 261.

(d) 3 P. W. 180.

(e) *Weeks v. Gore*, 3 P. W. 184, n. See also on the election of an executor or administrator to retain, *Burdet v. Pix*, 2 Brownl. & G. 50.

(f) *Gage, or Cage, v. Acton*, 1 Salk. 325, 1 Ld. Raym. 515, Com. 67; *Acton v. Peirce*, or *Acton*, 2 Vern. 480, Prec. Ch.

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237. That such a bond made to the wife herself is valid, see, farther, *Milbourn v. Ewart*, 5 Durn. & E. 381.

(g) *Roskelley v. Godolphin*, T. Raym. 483, 2 Show. 403; *Bookellet v. Godolphin*, S. C., Skinn. 214, cited Willes, 188.

(h) *Cockroft v. Black*, 2 P. W. 298; *Marriott v. Thompson*, Willes, 186. See also *Hodgkin v. Blackman*, Cas. T. Finch, 232, and *Britton v. Batthurst*, 3 Lev. 113.

and might give the covenant in evidence under the plea *plene administravit*.⁽ⁱ⁾ And in *Loane v. Casey*, a similar case, a nexcutrix was held to be entitled to retain assets to satisfy damages for a breach of covenant, by the husband entered into with a trustee for the wife to leave her all his personal estate, and 200*l.* a-year for life out of his real estates.^(j) And here De Grey, C. J., said, "Whenever an executrix has a right to a sum of money, whether it be strictly a debt to herself, or nominally to another, she may retain it." And he mentioned that "in a case before Eyre, C. J., a widow executrix was allowed to retain the money, with which she had paid off a mortgage on her jointure, the husband having covenanted it to be free from incumbrances; this being a satisfaction for his breach of covenant."^(k) And on an executor's right to retain for [*269] damages, Blackstone, J., said, "Damages that *are in their nature arbitrary, cannot be retained, because, till judgment, no man can foretell their amount. Such are damages founded upon *torts*. But where damages arise from the breach of a pecuniary contract, there is a certain measure for them, and such damages may well be retained. The remedy for a note of hand carrying interest is only in damages; but will any one say this shall not be retained? The jury here have ascertained the damages sufficiently, by finding that the arrears of the annuity already accrued are more than the value of both the real and personal assets."^(l)

"An executor may retain his own debt, or the debt of his trustee."^(m) He may also retain in satisfaction of a debt due to himself as trustee.⁽ⁿ⁾ And as an administrator may retain to satisfy a debt payable under a bond given to a trustee to secure to him, the administrator, the payment of that money;^(o) so if the trustee is himself administrator, he may retain in satisfaction of the money to be paid; as in the case of *Plumer v. Marchant*, where, before marriage, the husband covenanted with trustees, that his executors or administrators should, within six months after his death, pay 700*l.* to the trustees, upon certain trusts for the benefit of the wife and the children of the marriage. The husband died intestate, and one of the trustees took out administration. And on an action brought by a bond creditor, it was decided that the administrator might retain, and give the covenant made with him in evidence under the plea *plene administravit*.^(p) In *Thompson v. Thompson*, a husband, before marriage, covenanted with trustees, that the heirs, executors, or administrators of the husband, in case the wife survived him, should pay to the wife for her life, an annuity of 20*l.*; or that the heirs, executors, or administrators of the husband should pay to the trustees, within months after the death of the husband, 400*l.* And it was by the same deed declared and agreed, that such 400*l.*, in case the same should be [*270] paid, should be and remain vested in the *trustees. Here it was determined, that the wife, who survived, and took out administration to, her husband, was not entitled to retain in satisfaction of the 400*l.*; and on the ground, it should seem, that the intent of

(i) *Harry v. Jones*, 4 Price, 89. See, likewise, *Bowerbank v. Monteiro*, 4 Taunt. 844.

(j) 2 W. Bl. 965.

(k) *Ibid.* 967.

(l) 2 W. Bl. 968.

(m) 1 Sim. & St. 461. See 9 Price, 477.

(n) *Mavor v. Davenport*, 2 Sim. 227.

(o) *Marriott v. Thompson*, Willes, 186; *Franks v. Cooper*, 4 Ves. 763.

(p) 3 Burr. 1380; *Harry v. Jones*, 4 Price, 89.

the covenant was, that the annuity only should be paid to the wife, and not the principal or *corpus*, which it was meant should be paid to and remain vested in the trustees. (q)

An executor *de son tort*, or of his own wrong, appears to be one, who wrongfully intermeddles with the personal estate of a person deceased; in the case of a will, before the executor proves it, or administers; and in the case of an intestacy, before administration is granted. And an executor of his own wrong may also be one, who, after probate or administration by an executor, claims to be executor, and intermeddles or administers expressly in that character. (r) To this description of executor, and who does not afterwards legalise his own wrong by obtaining letters of administration, the right to retain is not allowed. (s) The encouragement, which a power of this kind would give to such wrongful executorships, is a manifest reason not to extend the privilege to them. An executor of his own wrong cannot retain even a debt of greater degree owing to himself; a point that was expressly decided in Coulter's case; (t) and there the *Court said, that "an executor of his own [*271] wrong should not retain, for from thence would ensue great inconvenience and confusion: for every creditor (and chiefly when the goods of the deceased are not sufficient to satisfy all the creditors) would contend to make himself executor of his own wrong, to the intent to satisfy himself by retainer, by which others would be barred." (u) And the same point is decided by the modern case, *Curtis v. Vernon*, where the executor was not permitted to retain, although he pleaded the rightful administratrix's assent to his retainer in satisfaction of his debt. (v)

When an action is brought against an executor of his own wrong, and he afterwards procures letters of administration to be granted to him, whereby he legalises his wrong, he is entitled to plead his lawful right to retain. And in some cases, even after plea put in, he may plead such right by plea *puis durrein continuance*. (w)

The Court of Chancery has said, "a Court of Equity will never assist a retainer;" (x) and that "the rule of this Court in cases of retainer is, unless the party can shew a legal right to retain, we never give it him;

(q) 9 Price, 464.

(r) Read's case, 5 Co. 33 b.; *Stokes v. Porter*, 2 Dyer, 166 b.; *Anon.* 1 Salk. 313. 2 Durn. & E. 100, 597; 2 Bl. Com. 507. On Acts which may make a person an executor of his own wrong, see, farther, stat. 43 Eliz. c. 8; 1 Rol. Abr. 918, 919; Com. Dig. tit. Administrator, C.; *Stokes v. Porter*, 2 Dyer, 166 b., 1 Anders. 11; *Anon. Dalis.* 94; *Laury v. Aldred*, 2 Brownl. & G. 183; *Kitchin v. Dixon*, or *Dixon, Gouldsb.* 116, *Noy*, 69; *Anon. Noy*, 69; *Palmer v. Litherland, Noy*, 86; *Ayre v. Ayre*, 1 Ch. Cas. 33; *Anon.* 1 Salk. 313, *Cas T. Holt*, 44; *Anon.* 7 Mod. 31; *Padget v. Priest*, 2 Durn. & E. 97; *Edwards v. Harben*, ib. 587; *Mountford v. Gibson*, 4 East, 441, 1 Smith, 129; *Femings v. Jarrat*, 1 Espin. 335; *Hall v. Elliot*, 1 Peake, 86, 3rd ed. 119; *Cottle v. Aldrich*, 1 Stark. 37, 4 M. & S. 175; *Hooper v. Summerset*, *Wightw.* 16. See also *Vernon's case*, *Clayt.* 116.

(s) *Whipper's case*, 1 Dyer, 2 a., Ca. 3, n.; *Alexander v. Lamb*, 1 Brownl. & G. 103; *West v. Lane*, ib. 104; *Bond v. Green* *Godb.* 217.—*Yelv.* 138, *Carth.* 104, 1 Y. & J. 415. See also *Atkinson v. Rawson*, 1 Mod. 208; *Prince v. Rowson*, 2 Mod. 51.

(t) *Coulter's case*, or *Coulter v. Ireland*, 5 Co. 30, Mo. 527, 1 Rol. Abr. 922, L. 4; *Ireland v. Coulter*, S. C., *Cro. Eliz.* 630.

(u) 5 Co. 30 b.

(v) 3 Durn. & E. 587; *Vernon v. Curtis*, S. C., 2 Hen. Bl. 18.

(w) *Williamson v. Norwich, Style*, 337, 1 Rol. Abr. 923; *Vaughan v. Browne*, *Andr.* 328, 2 Stra. 1106. And see *Kenrick v. Burges*, Mo. 126; *Pyne v. Woolland*, 2 Vent. 179; *Baker v. Beresford*, 1 Keb. 285, 1 Sid. 76; and *Curtis v. Vernon*, 3 Durn. & E. 587; authorities which appear to contradict *Whitehead v. Sampson*, 1 Freem. 265. See, farther, *Watson v. Harrison*, 1 Freem. 533.

(x) *Proc. Ch.* 181.

if he can shew a legal right, we never take it from him;"(y) "he who cannot retain in law cannot in equity."(z) From these rules it seems to follow, and it appears to be accordingly determined, that an executor is not allowed to retain, for the whole of his debt, property which at law is not assets to pay it, and which in a Court of Equity is distributable amongst creditors equally; although of such equitable assets he may, it should seem, retain sufficient to satisfy his proportionable part payable out of them.(a)

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*SECTION II.

OF RETAINER BY HEIR OR DEVISEE.

"WHERE an heir by bond or judgment is a creditor, *Quære*, if he shall not retain; the reason being the same in the case of an heir as it is of an executor, for neither can sue himself."(b) To this question it may be answered, that clearly an heir at law, who is a specialty creditor of his ancestor, may, by the common law, retain legal assets descended against other creditors of equal or lower degree;(c) and may plead this right in an action brought against him, as by a bond creditor of his ancestor.(d) The same right of retainer is allowed in a Court of Equity.(e) But in a suit, where, among the specialty debts of the ancestor, was a large sum due on bond to the heir and another person, as executors of the obligee; under the circumstances of the case, a Court of Equity would not permit the heir to retain in satisfaction of this debt: he did not by his answer claim to retain; and having at a late stage of the proceeding set up this claim, the Court said, retainer could not at that stage be allowed.(f) *Loomes v. Stotherd* decides, that when a husband devises all his real estate to his wife, she may, against specialty creditors of the testator, retain that estate in satisfaction of a debt due from him to the trustees of his marriage settlement, upon a bond for securing a sum of money for the benefit of the devisee and her children. This is the point of the case; and, in the judgment, Sir John Leach observed on retainer generally, as well as on that in the particular case. "At common law, an heir could retain for his own specialty debt: so a devisee, under the statute, must have the same right as an heir. An executor may retain his own debt, or the debt of his trustee; and therefore a devisee [*273] see may retain for his own specialty debt, or the debt of his trustee, and if the devisee be also the executor of a deceased creditor, he may first retain for his own debt, and next for the debt of his testator. But the devisee cannot retain his debt in priority

(y) 11 Vin. Abr. 72; 2 Eq. Cas. Abr. 426.

(z) *Ibid*.

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(b) 2 Vern. 62.

(c) 1 Sim. & St. 461.

(d) *Shetelworth v. Neville*, 1 Durn. & E. 544.

(e) 1 Sim. & St. 461; 1 Russ. 541, 542.

(f) *Player v. Foxhall*, 1 Russ. 538.

to the costs of the suit; because the costs of the suit are to be considered as expenses in administering the estate, and are the first charge upon an estate whether administered in or out of Court. But if a devisee states in his answer, that his right of retainer will exceed the assets, after such notice the plaintiff may be considered as proceeding at the peril of costs." (g)

A person devised his estate to trustees (whom he also made executors,) and their heirs, to be sold for payment of his debts. The trustees refused to act, and the creditors brought a bill for a sale. A question made was, "whether the heir at law, who was bound in several bonds with his father, by way of security, might not retain. But it was adjudged that he could not, but only come in for a rateable share with the other creditors." (h)

In *Shetelworth v. Neville*, which was an action of debt on two bonds made by the defendant's father, the defendant pleaded that he had not any lands or tenements by descent from his father, except a certain messuage and a windmill; and which messuage and windmill he pleaded were liable "to the payment and satisfaction of a certain sum of 100*l.* laid out and expended by the defendant, since the death of his father, for, in, and about the repairing of the said windmill, with the appurtenances, over and beyond the amount of the rent, issues, and profits thereof." To this plea there was a general demurrer, and judgment was given for the plaintiff. *Ashhurst, J.*, held the plea to be bad, on the grounds, besides the novelty of the plea, that it did not state the repairs were necessary; that it did not allege that the defendant had no notice of the plaintiff's demand, before the repairs were made; that an heir at law, till the possession is recovered against him, is entitled to the rents and profits, and in the meantime he may have received more than sufficient to pay for the repairs. *Buller, J.*, decided the plea was bad, on the single ground, that it did not state the repairs were necessary. (i)

*CHAPTER XXI.

[*274]

OF THE ORDER IN WHICH THE DEBTS OF A PERSON DECEASED ARE PAYABLE OUT OF HIS LEGAL ASSETS.

Of assets, some are called *legal*, and others *equitable*, assets. With the former the Courts of Law and of Equity pay certain debts in a particular order: with the latter a Court of Equity pays certain creditors equally, without regard to the order observed in distributing legal assets. (a)

When an executor or administrator is possessed of legal assets, it is his duty to pay out of them, first, a certain expense for the funeral of the deceased; secondly, the duty payable on the probate of the will or letters of administration, and certain other testamentary expenses: and, thirdly, before he pays any other debt owing by the deceased, he is bound to dis-

(g) 1 Sim. & St. 458.

(h) *Chambers v. Harvest*, Mos. 123.

(i) 1 Durn. & E. 454.

(a) *Plunket v. Penson*, 2 Atk. 290; *Silk v. Prime*, 1 Bro. C. C. 139, n. See also Chapter XXVII. of the present Treatise.

if he can shew a legal right, we never take it from him;"(y) "he who cannot retain in law cannot in equity."(z) From these rules it seems to follow, and it appears to be accordingly determined, that an executor is not allowed to retain, for the whole of his debt, property which at law is not assets to pay it, and which in a Court of Equity is distributable amongst creditors equally; although of such equitable assets he may, it should seem, retain sufficient to satisfy his proportionable part payable out of them.(a)

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(a) Plunket v. Penson, 2 Atk. 290; Silk v. Prime, 1 Bro. C. C. 138, n. See also Chapter XXVII. of the present Treatise.

charge his debts by record and specialty due to the Crown;(b) and, fourthly, such debts as are by particular statutes to be preferred before all others,—a priority which is given by the statute of 9 Anne, c. 10, s. 30, to money owing for the postage of letters; and by the statute 17 George II. c. 38, s. 3, to money received by virtue of the office of overseer of the poor.(c)

After the above payments are made, the next consideration, with reference to the satisfaction of debts, is, the order in which an executor or administrator is bound to pay the debts, which the *deceased [*275] at the time of his death owed to a subject. And here it will be recollected, that “among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to.”(d)

The debts, which a person at the time of his death owes to a subject, may consist of debts by judgment at law; by common law recognizance; by bond entered into for valuable consideration; by simple contract; and by voluntary bond. To these may be added several kinds of debts, which, for the purpose of payment out of personal assets, are equal to some class of the debts mentioned. In pursuing the subject of this chapter, the reader’s attention may, therefore, be directed to

1. *Judgments.*
2. *Common Law Recognizances.*
3. *Bonds.*
4. *Simple Contracts.*
5. *Voluntary Bonds.*
6. *Certain Debts, which, for the purpose of Payment out of personal Assets, are equal to some class of the Debts mentioned.*

1. Debts by judgment at law are entitled to be paid before common law recognizances, and debts by bond, and by simple contract.(e) But to support this right, it is necessary that the judgment be docketed pursuant to the statute 4 and 5 W. & M. c. 20; for if not so docketed, the executor is not bound to pay it before a debt by bond or by simple contract. And, accordingly, to an action of debt brought on the judgment, the executor may under the plea *plene administravit* discharge himself, by proof of payment of bond and other specialty debts.(f) And such an undocketed judgment, which the executor has not paid, cannot be pleaded by him to an action of *assumpsit* brought against him by a simple contract creditor.(g)

(b) Wentw. Off. Ex. ch. 12; Swinh. part 6, s. 16; God. Orph. Leg. part 2, ch. 28; 4 Burn Eccl. L. 348, 349; 2 Bl. Com. 511; 1 Sim. & St. 461. See also Chapters II., XVIII., and XIX., of the present Treatise.

(c) 2 Bl. Com. 511. Dr. Burn, it is observable, appears to have understood, that an executor or administrator is bound to pay, first, funeral expenses; secondly, money due from an overseer of the poor; thirdly, the charges of the probate of the will, or of the letters of administration; and, fourthly, crown debts. (4 Burn Eccl. L. 348.) The words of the statute 17 Geo. II. are, that the money

due from the overseer shall be paid “before any of his other debts are paid and satisfied.”

(d) 2 Bl. Com. 511; 3 Bl. Com. 18, 19. See also Chapter XX. of the present Treatise.

(e) Pemberton v. Barham, 4 Co. 59 b.; 5 Co. 29 a.; Bereblock v. Read, 4 Co. 59 b., Cro. Eliz. 734, 822; Robinson v. Tonge, 3 P. W. 398.—Cro. Eliz. 575, 793; 1 Rol. Abr. 926, R. pl. 1, 2; 927, S. pl. 4, 5; Vaugh. 94; 4 Mod. 296; 6 Durn. & E. 369; 7 Barn. & C. 452.

(f) Hickey v. Hayter, 1 Espin. 313, 6 Durn. & E. 384.

(g) Steele v. Roke, 1 Bos. & P. 207.

*2. Debts by common law recognizance are entitled to be paid before debts by bond, and by simple contract. *(h)* [*276]

3. Debts by bond are entitled to be paid before debts by simple contract. *(i)* And in the case of a bond conditioned to pay a sum of money at a future day, if a creditor by simple contract brings an action of *assumpsit* against the executor, he may plead such bond, and condition to pay money at a day not yet come; and, to the amount of the sum so payable by the condition of the bond, the assets are, by the plea mentioned, protected against the claim of the simple contract creditor. *(j)* But between this kind of bond, under which it is certain money will be payable, and a bond under which money may, on a contingency only, be payable, there is a material distinction. For the executor will not in equity be guilty of a *devastavit*, if he pays a simple contract debt, with the knowledge of a bond, under which money may on a contingency be payable; *(k)* as if the bond is entered into for the performance of covenants, and the executor pays the simple contract debt, before the condition of the bond is broken by any breach of the covenants. *(l)* And notwithstanding the bond, the simple contract creditor may at law recover his debt by action against the executor. *(m)* A bond or covenant of indemnity may create a contingent debt. Nevertheless, if the bond is forfeited, or the covenant is broken, at the testator's death, the obligee or covenantee will be a specialty creditor of the testator. *(n)*

4. In ranging the before mentioned judgments, recognizances, and bonds, in the order stated, it is understood that such debts are supported by valuable consideration. After specialty debts "contracted for valuable consideration are satisfied, debts by simple contract are entitled to be paid. *(o)* And of simple contract debts, the wages of a servant, within "the Statute of Labourers," *(p)* are perhaps payable before any other simple contract debt. *(q)* But if this privilege exists, it is not certain that other servants enjoy the same right of preference. *(r)* [*277]

5. After debts by simple contract, and supported by valuable consideration, are satisfied, executors are bound to pay debts by judgment

(h) Robson v. Francis, 1 Rol. Rep. 405, 1 Rol. Abr. 925, Q. pl. 2; Edgcomb v. Dee, Vaugh. 89, 102, 103.

(i) 9 Co. 88 b.; Cro. Eliz. 316; 4 Taunt. 846; 7 Barn. & C. 452.

(j) Buckland v. Brook, Cro. Eliz. 315; Lemun v. Fooke, 3 Lev. 57; Bank of England v. Morice, 2 Stra. 1028, 1035, Cas. T. Hardw. 219. See also Goldsmith v. Sydnor, Cro. Car. 362, 1 Rol. Abr. 925, Q. 4; and Robson v. Francis, 1 Rol. Abr. 925, Q. 2.

(k) See Eeles v. Lambert, 2 Vern. 101, n; and Robson v. Francis, 1 Rol. Rep. 405, 1 Rol. Abr. 925, Q. pl. 3.

(l) Hawkins v. Day, Amb. 160, and ed. Blunt, Append. 803.

(m) Harrison's case, 5 Co. 28 b.

(n) Cox v. Joseph, 5 Durn. & E. 307; Munson v. May, 3 Ves. & B. 194.

(o) 7 Barn. & C. 452; 2 Bl. Com. 511; Wentw. Off. Ex. ch. 12, 14th ed. p. 297; Soam v. Bowden, Cas. T. Finch, 396.

(p) 1 Rol. Abr. 927, U. 1. Statutes of Labourers appear to be, 23 Edw. III. 25 Edw. III., 5 Eliz. c. 4, 1 Jam. I. c. 6, 20 Geo. II. c. 19, 53 Geo. III. c. 40.

(q) 1 Rol. Abr. 927, U. 1, 4; 2 Bl. Com. 511; Shepp. Touch. 478.

(r) 1 Rol. Abr. 927, U. 4; where Rolle inquires—"Quære if a debt on simple contract be to be paid after a debt for wages to a servant, who is not within the Statute of Labourers." Between servants, there appears to be this distinction,—that one who is within a Statute of Labourers can, and one who is not within such a statute cannot, on a simple contract, sustain an action of debt against an executor for wages owing by his testator. Fitzh. Abr. tit. *Executors*, 50; Bro. Abr. tit. *Dette*, 53, 188, tit. *Executors*, 41, 87, 163; 9 Co. 88 a., 88 b.; Mo. 698; Wentw. Off. Ex. ch. 11.

voluntarily, that is, without valuable consideration, confessed by the testator;(s) and debts by the testator's voluntary bond, conditioned to pay money.(t) But here it is to be understood, that such voluntary bond is grounded on a lawful consideration; as, one that is meritorious,(u) such as payment of debts, or making a provision for a wife or child;(v) or the good(w) consideration of blood, or of natural love and affection; or some other lawful consideration or motive, as of duty, justice, or honour.(x) A voluntary bond, sustained by either of such lawful considerations, [*278] clearly may be valid.(y) But a bond, the *condition of which binds the obligor to do an act that is *malum in se*, is as clearly void.(z) And so likewise is a bond, the consideration of which is an immoral act, or an act that is *malum in se*, to be done by the obligee.(a) When the consideration of a voluntary bond to pay an annuity is lawful, and arrears of the annuity grow due, those arrears are, as between the obligor and obligee, a debt for which the obligor may immediately be sued. If, then, the obligee promises not to sue, and this promise is made the consideration of a second bond to pay the arrears, or another annuity in addition to or in the place of the first, such second bond is a bond for valuable consideration.(b)

A description of voluntary bond, not unfrequently met with, is a bond given to a kept-mistress. Its validity depends, it will be seen, on circumstances, and many distinctions are taken by the Courts on securities of this nature.

The cases of seduction, or incontinence, between *unmarried* persons, may first be noticed.

If on the seduction of an unmarried female, the seducer previously gives to her a bond, as the price of her virtue, such bond is void.(c) If, on the other hand, after the seduction, and, although the woman is some time kept by the man, he, either at the time when the illicit intercourse between them ceases, or afterwards, gives, from some lawful motive, to her a bond, this bond is valid.(d) But, in a third case, if, after the seduction, the bond is entered into as the price of future cohabitation, the immoral consideration of this bond makes it void.(e) In a farther in-

(s) *Fairebeard v. Bowers*, 2 Vern. 202, Prec. Ch. 17.

(t) *Jones v. Powell*, 1 Eq. Cas. Abr. 84, 143; *Williams v. Sawyer*, Sel. Ca. Ch. 6, 2 Eq. Cas. Abr. 182; *Saunders v. Graves*, 1 Dick. 93; *Ramsden v. Jackson*, 1 Atk. 294; *Blount v. Doughty*, 3 Atk. 481, 483; *Bedford v. Gibson*, 9 Mod. 5th ed. 415. See also 3 P. W. 222; 1 Bro. C. C. 38; *Gilham v. Locke*, 9 Ves. 612; *Loeffles v. Lewen*, Prec. Ch. 370; and *Hunt v. Maunsell*, 1 Dow P. C. 211.

(u) 3 P. W. 340.

(v) 3 P. W. 341; 3 Bro. C. C. 14; 9 Ves. 614.

(w) 2 Bl. Com. 297.

(x) 1 P. W. 607; 2 P. W. 434; 2 Wils. 341; 9 Ves. 614.

(y) *Wright v. Moor*, 1 Ch. Rep. 157; *Beard v. Nutthall*, 1 Vern. 427; *Blackborn v. Edgley*, 1 P. W. 607; *Stiles v. Attorney General*, 3 Atk. 152.

(z) Co. Litt. 206 b.; 1 Rol. Abr. 418, Y. pl. 2, 3, 6; 1 P. W. 189; 10 Mod. 134; *Prat v. Phanner*, Mo. 477.

(a) 1 Rol. Abr. 418, Y. pl. 4, 5; *Mason v. Watkins*, 2 Ventr. 109; *Walker v. Perkins*, 1 W. Bl. 517, 3 Burr. 1568. See *Brook v. King*, 1 Leon. 72, and *Jones' case*, ib. 203.

(b) *Stiles v. Attorney General*, 3 Atk. 152; *Gilham v. Locke*, 9 Ves. 612. See also *Blount v. Doughty*, 3 Atk. 484, and *Hunt v. Maunsell*, 1 Dow P. C. 211.

(c) *Walker v. Perkins*, 1 W. Bl. 517, 3 Burr. 1568; *Franco v. Bolton*, 3 Ves. 371.

(d) *Marchioness of Annandale v. Harris*, 2 P. W. 432, 1 Bro. P. C. ed. Toml. 250, cited 9 Mod. 5th ed. 265; *Cray v. Rooke*, Cas. T. Talb. 153; *Turner v. Vaughan*, 2 Wils. 339.

(e) *Walker v. Perkins*, 1 W. Bl. 517; 3 Burr. 1568; *Franco v. Bolton*, 3 Ves. 371.

stance, if an unmarried woman is kept by a man, who was not *her seducer, and he, at the time when the connexion [*279] between them ceases, or afterwards, gives to her, from some lawful motive, a bond, this bond is valid.(f) And it may be valid, notwithstanding the woman was a common prostitute for several years before the obligor's acquaintance with her.(g) And, under some circumstances, the bond may be supported, notwithstanding that, at the time when it was given, the unlawful intercourse between the parties was not broken off, and the woman afterwards remained in the keeping of the obligor.(h) But if the consideration of the bond is future cohabitation, this circumstance will vitiate it.(i)

When, in the cases mentioned of seduction or incontinence, the consideration of the bond is unlawful, an action cannot, at law, be sustained on it.(j) And in such action, the bad consideration of the bond, and which does not appear on the face of it, may be averred in a special plea.(k) And although, in some cases, a Court of Equity may dismiss a bill filed to deliver up the bond, that cannot be supported at law,(l) yet certainly a Court of Equity will not enforce the payment of it.(m) When the consideration of the bond is lawful, the money so secured may be recovered by action at law.(n) And against such a bond, a Court of Equity will, in general cases, not relieve;(o) but, on *the [*280] contrary, will support it, and decree the money to be paid;(p) and, when it is to be paid out of the assets of the obligor, it is entitled to payment, after satisfaction of his simple contract debts.(q) And it may be added, that if the bond binds the heirs of the obligor, his real assets are liable to satisfy the debt, in case of a deficiency of his personal estate.(r) In some cases, however, the bad character of the woman, previously to the obligor's acquaintance with her, and circumstances of imposition on her part, may constitute a ground, on which a Court of Equity will relieve against the bond, and order a perpetual injunction to stay proceedings at law upon it.(s)

A distinction has, on the present subject, been drawn between a deed,

(f) *Whaley v. Norton*, 1 Vern. 483. See also *Lloyd v. Carter*, 2 Atk. 84.

(g) *Hill v. Spencer*, Amb. 641, and ed. Blunt, Append. 836; *Gray v. Mathias*, 5 Ves. 286; *Friend v. Harrison*, 3 Carr. & P. 584. See *Robinson v. Cox*, 9 Mod. 5th ed. 263.

(h) *Hill v. Spencer*, above; *Dillon v. Jones*, cited 5 Ves. 291, 293, 294; *Gray v. Mathias*, and *Friend v. Harrison*, above. See also *Lloyd v. Carter*, 2 Atk. 84.

(i) *Walker v. Perkins*, *Franco v. Bolton*, *Gray v. Mathias*, and *Friend v. Harrison*, above. See *Quidihy v. Kelly*, 1 Vern. and Scriv. 515; where the Court seems to have supported a rent-charge granted to a woman, and the grant of which was to be void, if she should at any time after be minded to quit or abscond from M. K. (the person with whom she lived,) so as to cohabit with any other man, without the consent and approbation of M. K.

(j) *Walker v. Perkins*, above.

(k) *Collins v. Blantern*, 2 Wils. 347; *Friend v. Harrison*, above.

(l) *Gray v. Mathias*, 5 Ves. 286, on the second bond.

(m) 5 Ves. 294. See *Matthew v. Hanbury*, 2 Vern. 187, cited ib. 242, and in Amb. ed. Blunt, 838.

(n) *Turner v. Vaughan*, 2 Wils. 339; *Friend v. Harrison*, above.

(o) *Whaley v. Norton*, 1 Vern. 483; *Bainham v. Manning*, 2 Vern. 242; *Hill v. Spencer*, above; *Gray v. Mathias*, above, on the first bond.

(p) *Marchioness of Annandale v. Harris*, 2 P. W. 432, 1 Bro. P. C. ed. Toml. 250, cited 9 Mod. 5th ed. 265. See also *Cary v. Stafford*, Amb. 519, and ed. Blunt, Append. 831.

(q) *Gray v. Rooke*, Cas. T. Talb. 153.

(r) *Ibid.*

(s) *Clarke v. Periam*, 2 Atk. 333, 337; *Clark v. Peryam*, S. C., 9 Mod. 5th ed. 340; *Robinson v. Cox*, ib. 263. See *Bodly v. Anon.*, 2 Ch. Cas. 15.

as a bond, and a parol promise. In *Binnington v. Wallis*, an action brought on such a promise, the declaration stated, that the plaintiff had cohabited with the defendant as his mistress, and had, before the promise, wholly ceased to cohabit with him. The Court held,—“The declaration is insufficient; it is not averred that the defendant was the seducer, and there is no authority to shew that past cohabitation alone, or the ceasing to cohabit in future, is a good consideration for a promise of this nature. The cases cited are distinguishable from this, because they are all cases of deeds; and it is a very different question, whether a consideration be sufficiently good to sustain a promise, and whether it be so illegal as to make the deed, which required no consideration, void. There must, therefore, be judgment for the defendant.”^(t) In *Gibson v. Dickie*, an earlier case, and which, it seems, was not noticed in the one last mentioned, the declaration stated, that the defendant agreed, in case the plaintiff and defendant should separate, that he, the defendant, would allow the plaintiff 30*l.* per annum during her life. The defendant pleaded *non assumpsit*; and a verdict having been found for the [*281] plaintiff, it was moved, *in arrest of judgment, that the agreement was void, because the allowance of the annuity in case of separation was by way of inducement to the plaintiff to continue the illicit cohabitation. The Court held the agreement to be “a voluntary compensation, by way of maintenance, made to the plaintiff for the injury done her by their past illicit connection;” and said, “that so far from its being an inducement to her to continue the cohabitation, it was rather an inducement to separate.” And the rule was refused.^(u) These two apparently contradictory authorities seem to leave it doubtful whether, in future cases, in which seduction is not an ingredient, past cohabitation alone may be thought a sufficient consideration to support an action on a parol promise to provide for a mistress.

On securities intended to provide for a kept-mistress, several other cases have occurred, where one of the parties was, at the time of such connexion, a *married* person.

If a married man seduces a female, who at the time knows that he is married, and she is afterwards kept by him, and he, when the connexion between them ceases, gives, on some lawful consideration, to her a bond, it is decided that this bond is, in a Court of Law, valid.^(v) And in many cases, a Court of Equity will not afford relief against it;^(w) but, on the contrary, will often uphold it, and decree the money to be paid.^(x) When, however, one of the parties is a married person, this circumstance, united with some other cause to regard the woman in an unfavourable light, may, in some cases, induce a Court of Equity to refuse to aid her, and so to leave her to her remedy, if any, at law;^(y) and may, in other instances, incline the Court to interpose against her, and to decree the bond or other security to be delivered up to be cancelled.^(z) A case is reported, wherein a man married a woman, who did not know that he

(t) 4 Barn. & Ald. 650. On a sufficient consideration to support a promise, see also 1 Madd. Rep. 564.

(u) 3 M. & S. 463.

(v) *Nye v. Moseley*, 6 Barn. & C. 133, 9 Dowl. & Ry. 165.

(w) *Spicer v. Hayward*, Prec. Ch. 114.

(x) *Spicer v. Hayward*, above; *Knye v. Moore*, 1 Sim. & St. 61, 2 Sim. & St. 260; *Nye v. Moseley*, S. C., 2 Sim. 161.

(y) *Priest v. Parrott*, 2 Ves. 160, cited 6 M. & S. 138, and 2 Sim. & St. 264. See *Hunt v. Maunsell*, 1 Dow. P. C. 211.

(z) *Robinson v. Geo*, 1 Ves. 254.

had a wife then living; and she continued to live with him after the discovery that his first wife was *alive, and until, it seems, the time of his death. Some years after that discovery, he gave [*282] her a bond to leave her 1000*l.* at his death; and, under the particular circumstances of the case, a Court of Equity decreed this bond to be paid out of the husband's assets, postponing it, nevertheless, to all his debts by simple contract.(a) In another case, a married woman, separated from her husband, was induced to live with an unmarried man; and he, on discontinuing this connection, promised, in writing, to secure to her an annuity for her life, and which he regularly paid until his death. To a bill afterwards filed in equity against his executrix, to have the annuity secured out of his assets, a general demurrer was put in; and such demurrer was allowed by the Court, on the ground that a bill does not lie to enforce a voluntary agreement,(b) and the promise in this case was merely voluntary, not being founded on any good, meritorious, or valuable consideration.(c)

6. Here are to be noticed certain debts by judgment, decree, and recognizance; debt for rent; and a simple contract debt of a citizen of London.

When a creditor obtains against his debtor a judgment in any Court of Record in England, this judgment, although of the Piepoudre Court, or Court of the most narrow jurisdiction, is equal to the judgment of either of the Supreme Courts in Westminster Hall.(d) A debt by judgment, not docketed according to the statute 4 and 5 W. & M., c. 20, is equal only to a debt by simple contract.(e) A debt recovered by a judgment in a foreign country, as France, or Jamaica, is in England equal only to a debt by simple contract.(f) And a debt recovered by a judgment in Ireland stands, it is probable, no higher.(g) A creditor *sued [*283] in the Lord Mayor's Court for his debt, and obtained judgment to have execution of certain money in the hands of the garnishee. It was determined that, in the administration of the *garnishee's* assets, the money so recovered was not a judgment debt; and it seems to have been held to be equal to a simple contract debt only.(h)

For the purpose of payment out of personal assets, a debt by final decree (as distinguished from a decree *Quod Computet*, or for an account,(i)) in a Court of Equity, Chancery or Exchequer, is in Equity equal to a judgment at law.(j)

A debt by recognizance, not enrolled, has been held to be equal only, and not superior to a bond debt.(k)

(a) *Lady Cox's case*, 3 P. W. 339. See *Lord Braybrooke*, 4 Campb. 380, 1 Stark. 219.

(b) 1 Atk. 10; 12 Ves. 46, 47; 18 Ves. 99; *Colman v. Sarrel*, 1 Ves. jun. 50, 3 Bro. C. C. 12, cited 6 Ves. 682.

(c) *Matthews v. L—e*, 1 Madd. 558. See also *Knye v. Moore*, 1 Sim. & St. 64.

(d) 2 Vern. 89; *Cas. T. Talb.* 221; 3 Swanst. 575.

(e) *Hickey v. Hayter*, 6 Durn. & E. 384; *Steele v. Rorke*, 1 Bos. & P. 307; *Landon v. Ferguson*, 3 Russ. 349.

(f) *Dupleix v. De Roven*, 2 Vern. 540; *Walker v. Witter*, Dougl. 1, 5; *Atkinson v.*

(g) *Harris v. Saunders*, 4 Barn. & C. 411, 413, 418, 6 Dowl. & Ry. 471.

(h) *Holt v. Murray*, 1 Sim. 485.

(i) *Smith v. Eyles*, 2 Atk. 385; *Perry v. Phelps*, 10 Ves. 34.

(j) *Shafto v. Powel*, 3 Lev. 356; *Morrice v. Bank of England*, *Cas. T. Talb.* 217; *Bishop v. Godfrey*, *Prec. Ch.* 179.

(k) *Bothomly v. Lord Fairfax*, 1 P. W. 334, 2 Vern. 750. See *Glynn v. Thorpe*, 1 Barn. & Ald. 153.

Rent reserved by a lease for years, and due from a testator at the time of his death, is equal to a debt by specialty. And it bears this equal rank, whether the lease is made by deed or by parol, and notwithstanding it is determined before the testator's death.^(l) To an action, therefore, brought at law for the rent, the executor cannot plead that a debt by bond is unpaid.^(m) But if a bond debt is paid before the action for the rent is brought, he may plead this payment.⁽ⁿ⁾ And if a debt by bond is due to the executor himself, he may plead his title to retain it.^(o) Also if the executor has paid the rent before action brought against him on a bond, he may to this action plead the payment of the rent.^(p) If the rent is reserved half yearly, and, after the death of the testator, rent becomes due for half a year, beginning before and ending since his death, this rent is equal to a debt by bond; and, on an action brought by a bond creditor, *the executor may, under the plea *plene administravit*, prove payment of such rent.^(q)

By the custom of London, a simple contract debt owing from one citizen to another is equal to a debt by bond. And this custom is valid against a stranger and no citizen, to whom the party indebted by simple contract is indebted by bond.^(r)

(l) *Newport v. Godfrey*, 3 Lev. 267, 2 Vent. 184, 4 Mod. 44; *Godfrey v. Newport*, Comberb. 183; *Godefroy v. Newton*, 12 Mod. 7; *Stonehouse v. Ilford*, Com. 145; *Brown v. Holyoak*, 1 Barnes, 202; *Showell v. Cole-drop*, 17 May, 1745, 1 Madd. Chan. 2nd ed. 562, n.

(m) *Ibid.*; 1 Ld. Raym. 516; 1 Salk. 326.

(n) 1 Ld. Raym. 516; 1 Salk. 326.

(o) *Cage, or Gage, v. Acton*, 1 Ld. Raym.

515, 1 Salk. 325, 1 Freem. 512, Carth. 511, Cas. T. Holt, 309.

(p) *Phillips v. Lee*, 1 Freem. 262; *Willet v. Earle*, 1 Vern. 490.

(q) *Thompson v. Thompson*, 9 Price, 464.

(r) *Snelling's case*, or *Snelling v. Norton*, 5 Co. 82 b., Cro. Eliz. 409; *Scudamore v. Hearne*, Andrews, 340.—Hob. 86, Hardr. 303, 1 Rol. Abr. 555, M. pl. 1, 557, N.

*CHAPTER XXII.

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OF THE POWER OF AN EXECUTOR TO EXERCISE A PREFERENCE
BETWEEN CREDITORS.

- SECT. I. *Of the power of an Executor, where certain Creditors are of equal Degree, and he is not sued by either, to pay one in preference to another.*
- II. *Of the Power of an Executor, where Creditors are of equal Degree, and he is sued at Law or in Equity, to pay one in preference to another.*
- III. *Of the Power of an Executor to confess Judgment to one Creditor, and plead it to action brought by another Creditor.*

SECTION I.

OF THE POWER OF AN EXECUTOR, WHERE CERTAIN CREDITORS ARE OF
EQUAL DEGREE, AND HE IS NOT SUED BY EITHER, TO PAY ONE IN PRE-
FERENCE TO ANOTHER.

WHEN a testator owes to certain creditors debts of equal degree, his executor, who is not by either of them sued at law, (a) or in equity, (b) has the power to exercise a preference among them, by paying, out of legal (c) assets in his hands, the whole of one or more of the debts, notwithstanding he has notice of the rest, and although this payment will quite exhaust the assets, and leave the remaining equal debts mentioned wholly unsatisfied. (d) *And a demand made by one or [*286] more of the creditors for payment does not take from the executor his power to pay any other of them first. (e) If, therefore, the equal debts are due on judgments, bonds, or simple contracts; such judgments are not necessarily payable in the order in which they were signed or entered up against the testator, but the executor may prefer in payment whichever judgment creditor he pleases, and may pay him first, who last obtained judgment; (f) and the like preference may be shewn among the

(a) Bro. Abr. tit. Executors, pl. 172; 1 M. & S. 403, 405, 407.

(b) Bright v. Woodward, 1 Vern. 369; Robinson v. Tonge, 3 P. W. 401; Maltby v. Russell, 2 Sim. & St. 227.

(c) See Mason v. Williams, 2 Salk. 507.

(d) 10 Mod. 496; 3 Barn. & C. 322. Of "Considerations in conscience, touching payment of debts, and the preferring or respect of persons," see Wentw. Off. Ex. ch. 22.

(e) Wentw. Off. Ex. ch. 12, 14th ed. p. 282.

(f) 1 Rol. Abr. 926, R. 3; 11 Vin. Abr. 293, 301; Wentw. Off. Ex. ch. 12, 14th ed.

p. 269, where the author of "The Office and Duty of Executors" states—"Between one judgment and another had against the testator, precedency or priority of time is not material; but he, which first sueth execution, must be preferred; and before any execution sued, it is at the election of the executor, to pay whom he will first. Yea, if each bring a *scire facias* upon his judgment, the executor may yet confess the action of which he will first notwithstanding the *scire facias* was brought by the one before the other." See Cro. Eliz. 735.

creditors by bond,(g) or by simple contract;(h) presuming in the case of bond creditors, that the money paid is, at the time of such payment, due under the bond; for an executor is not allowed to prefer before a bond, on which the money is now due, a bond on which the money is payable at a day to come only.(i)

SECTION II.

OF THE POWER OF AN EXECUTOR, WHERE CREDITORS ARE OF EQUAL DEGREE, AND HE IS SUED AT LAW OR IN EQUITY, TO PAY ONE IN PREFERENCE TO ANOTHER.

WHEN of two creditors of equal degree, namely, by bond, one of them brings an action at law against the executor, here, until the executor has notice of the action, he may in preference voluntarily pay, out of legal(j) [*287] assets, the debt of the other equal *creditor, and in the action plead this payment.(k) And if the action is brought by one of two creditors by simple contract, the like payment before notice may be made to the other.(l) But if, in either of the two cases mentioned, the executor has notice of the action, then after this notice he cannot lawfully prejudice the creditor, by whom he is so sued, by a voluntary payment to the other creditor, by whom he is not sued.(m) But if this creditor does not bring an action against him, the executor may, before judgment in the action brought, pay the debt there put in suit.(n) If after the one action brought, the other equal creditor also sues at law the executor, here, after notice of both actions, the executor cannot voluntarily pay either creditor before judgment obtained by him.(o) But so soon as one has obtained judgment, him the executor may immediately pay; for he who first obtains judgment is entitled to first payment.(p)

When there are two equal creditors; as by bond or simple contract, and one of them, for payment of his own debt only, sues the executor in a Court of Equity, and the Court does not take on itself the general administration of the assets, then, whether after notice of the bill filed, the executor may pay the debt of the other creditor, by whom he is not at law or in equity sued, is perhaps a point which it may be most safe to

(g) Bro. Abr. tit. Executors, pl. 172; 2 P. W. 299; Wentw. Off. Ex. ch. 12, 14th ed. p. 277.

(h) 3 Barn. & C. 322, 324.

(i) Doct. & St. Dial. 2, ch. 10, ed. 1709, p. 158; Bro. Abr. tit. Executors, pl. 172; 1 Rol. Abr. 926, Q. pl. 5; Wentw. Off. Ex. ch. 12, 14th ed. p. 277, 278.

(j) See *Mason v. Williams*, 2 Salk. 507.

(k) *Scarle's case*, Mo. 678, cited Carter Rep. 228; *Corbet's case*, 1 Leon. 312, 2 Leon. 60; *Anon. M. 4 Eliz. 1 Dyer*, 32 a., Ca. (2), n.; *Britton v. Bathurst*, 3 Lev. 115, Wentw. Off. Ex. ch. 12, 14th ed. p. 282.

(l) Ibid.

(m) *Scarle's case*, Mo. 678.—Doct. & St. Dial. 2, ch. 10, ed. 1709, p. 157; Bro. Abr.

tit. Executors, pl. 172; 1 Rol. Abr. 926, Q. pl. 6, 7; 1 M. & S. 403, 405, 407; 2 Sim. & St. 228. See also 2 Vern. 300, and *Parker v. Dee*, 2 Ch. Cas. 201, and 3 Swanst. 531, n.

(n) Bro. Abr. tit. Executors, pl. 172; 3 Barn. & C. 322, 324; 2 P. W. 299; Wentw. Off. Ex. ch. 12, 14th ed. p. 277, 282.

(o) 1 Rol. Abr. 926, Q. pl. 9; Wentw. Off. Ex. ch. 12, 14th ed. p. 282. See Bro. Abr. tit. Executors, pl. 172, and 1 Rol. Abr. 926, Q. pl. 8.

(p) Doct. & St. Dial. 2, ch. 10, ed. 1709, p. 157; Bro. Abr. tit. Executors, pl. 172; 1 Rol. Abr. 927, T. pl. 1; Vaugh. 95; 3 Atk. 209; 2 Sim. & St. 228; Wentw. Off. Ex. ch. 12, 14th ed. p. 282.

consider as doubtful. Some of the authorities lead to the conclusion that he may not, (g) *while others affirm that he may; (r) and in the latter class must be ranged the late case, *Maltby v. Russell*, (s) which, nevertheless, it is observable, was a creditor's suit, and appears to have been one, wherein the bill was filed for the general administration of the assets. [*288]

SECTION III.

OF THE POWER OF AN EXECUTOR TO CONFESS JUDGMENT TO ONE CREDITOR, AND PLEAD IT TO ACTION BROUGHT BY ANOTHER CREDITOR.

WHERE there are two creditors of *different* degree, namely, by bond and by simple contract, and the simple contract creditor brings an action against the executor, here if, *before* notice of the bond debt, the executor confesses judgment in this action, such judgment may be pleaded in an action brought by the bond creditor against the executor. (t) But if, *after* notice of the bond debt, the executor confesses judgment in the action brought by the creditor by simple contract, this judgment cannot be pleaded in an action brought by the bond creditor against the executor. (u)

Where there are two creditors of *equal* degree, namely, by bond or by simple contract, and each equal creditor brings an action against the executor, the executor may before pleading to the one action confess judgment in the other; and this judgment may be pleaded to the action brought by the other creditor, notwithstanding it was confessed to him who last brought his action, and the executor had, at the time of such confession, notice of the action to which he now pleads it. (v) And if in the first *action brought by one of two creditors of equal degree, as by one of two specialty, or by one of two simple [*289] contract creditors, issue is joined, and after such issue the second action is commenced, in this later action the executor may voluntarily suffer or confess judgment, and, by the plea *puis darrein continuance*, plead this judgment in answer to the first action; and this plea may be made, notwithstanding the executor had, before the commencement of the first action, notice of the debt, on which the judgment pleaded was recovered. (w) But where there are several debts by simple contract, here if

(g) *Parker v. Dee*, 2 Ch. Cas. 201, 3 Swanst. 531, n.; *Bright v. Woodward*, 1 Vern. 369; *Robinson v. Tonge*, 3 P. W. 401. See also 2 Vern. 89, 300. These authorities accord with the decree of the Lord Keeper Wright, in the case of *Darston v. Earl of Orford*, Prec. Ch. 188, 3 P. W. 401, n., a decree which was, however, reversed in the House of Lords.

(r) *Darston v. Earl of Orford*, above; *Mason v. Williams*, 2 Salk. 507.

(s) 2 Sim. & St. 227.

(t) *Davies v. Monkhouse*, Fitzg. 76; *Harman v. Harman*, 3 Mod. 115; *Paterson v. Huddleston*, 1 Barnard. 186; *Sawyer v.*

Mercer, 1 Durn. & E. 690. See also 10 Mod. 428.

(u) *Sawyer v. Mercer*, 1 Durn. & E. 690.

(v) *Scarle's case*, Mo. 678.—Doct. & St. Dial. 2, ch. 10, ed. 1709, p. 157, 158; 1 Rol. Abr. 926, Q. pl. 10; Vaugh. 95; 1 Sid. 21; 1 Ves. 212; 5 Durn. & E. 238, 239; 1 M. & S. 403, 405, 407; 3 B. & C. 322, 324, 325, 330. See also *Waters v. Ogden*, Dougl. 435, 4th ed. 452, *Goodfellow v. Burchett*, 2 Vern. 299, and *Smith v. Eyles*, 2 Atk. 386.

(w) *Prince v. Nicholson*, 5 Taunt. 665, 6 Taunt. 45, 1 Marsh. 280; *Lyttleton*, or *Littleton*, v. Cross, 3 B. & C. 317, 5 Dowl. & Ryl. 175.

the executor confesses judgment to one of them, in trust for the satisfaction of this creditor's own debt, and of the debts of other particular creditors by simple contract, this judgment is not allowed to prejudice the remaining simple contract creditors of the testator; for if, after the judgment, one of such remaining creditors brings an action against the executor, he cannot to this action plead the judgment before confessed by him. (x)

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*CHAPTER XXIII.

OF PRIORITY BETWEEN TWO CREDITORS, BY ONE OR BOTH OF WHOM THE EXECUTOR IS SUED AT LAW OR IN EQUITY.

If, after the death of a testator, a creditor by bond brings an action against the executor, and obtains judgment, he may, by taking out execution, acquire payment before other bond creditors. And, in the like compulsory way, a creditor by simple contract may acquire satisfaction, not only before other simple contract creditors, but also before the bond creditors of the testator. (a)

If there are two creditors of different degree, namely, by bond and by simple contract, and the simple contract creditor brings an action against the executor, the executor may plead to this action the debt by bond, (b) and although the bond is for payment of money at a day to come. (c) But if the simple contract creditor obtains judgment, as he by this means makes himself a creditor by judgment, he is entitled to be paid before the creditor by bond. (d)

And, by greater reason, if there are two creditors of equal degree, namely, by bond, and one of them brings an action against the executor, and obtains judgment, this judgment creditor is entitled to payment before the creditor by bond. And the like priority may be gained by one of two equal creditors by simple contract. (e) The judgment may be pleaded to an action brought by the other equal creditor. (f)

[*291] *If two creditors of equal degree both obtain judgment against the executor, then, between the two judgments, the one, which before the other is signed or entered up, (g) is entitled to first payment. (h) And the same priority seems to take place, if two creditors of different degree, as by bond and simple contract, both obtain judgment. (i)

If the executor is sued in equity, then, between two final decree debts,

(x) Tolputt v. Wells, 1 M. & S. 395.
(a) Vaugh. 94, 95; Doct. & St. Dial. 2, ch. 10, ed. 1709, p. 156, 157.

(b) 3 Lev. 114; Cas. T. Talb. 219.
(c) Buckland v. Brook, Cro. Eliz. 315; Lemun v. Fooke, 3 Lev. 57.

(d) Vaugh. 94, 95; 3 Mod. 115. See Comberb. 318, and Britton v. Batthurst, 3 Lev. 113.

(e) Vaugh. 94, 95; 1 Rol. Abr. 927, T. pl. 1.

(f) Davies v. Monkhouse, Fitzg. 76.
(g) Cas. T. Talb. 223, 224; 3 Swanst. 582.

(h) Vaugh. 95; 1 Rol. Abr. 927, T. pl. 1; 1 Ves. 214; 3 Atk. 209; Morrice v. Bank of England, Cas. T. Talb. 217, 219, 220, 223, 226, 3 Swanst. 585.

(i) Vaugh. 95; Morrice v. Bank of England, Cas. T. Talb. 217.

that, which is due under the decree first pronounced,(j) is entitled to first payment.(k)

•CHAPTER XXIV.

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OF PRIORITY BETWEEN TWO CREDITORS, BY ONE OF WHOM THE EXECUTOR IS SUED AT LAW, AND BY THE OTHER IN EQUITY.

SECT. I. *Of the Equality of a Judgment at Law, and a Decree in Equity.*

II. *Of an Injunction by Equity, to restrain a Creditor's Action at Law.*

III. *Of Cases wherein a Creditor's Action at Law is unimpeded and favoured in Equity.*

SECTION I.

OF THE EQUALITY OF A JUDGMENT AT LAW, AND A DECREE IN EQUITY.

ALTHOUGH it is certain that a decree of a Court of Equity may cause the possession of land to be delivered to a person, to hold until he has thereout levied a certain sum of money, and in this sense the decree may bind the land,(a) yet, when a Court of Equity merely decrees a sum of money, as a debt or a legacy,(b) to be paid, this decree, although by a sequestration land may be affected or bound by it,(c) yet is not, like a judgment at law, an immediate lien on land.(d) In other respects, also, a final decree, as distinguished from a decree *quod computet*, or for an account,(e) may not be equal to a judgment.(f) But, to some *intents, it certainly is so.(g) And, in particular, it is in [*293] many ways equal to a judgment, when money, which it decrees to be paid, is payable out of personal assets.(h)

(j) Cas. T. Talb. 224; 3 Swanst. 580, 581.

(k) Morrice v. Bank of England, Cas. T. Talb. 217, 3 Swanst. 578, 585, 2 Bro. P. C. ed. Toml. 465; Martin v. Martin, 1 Ves. 213, 214; Ashley v. Pocock, 3 Atk. 208. See Anon. 3 Atk. 602, and Abbis v. Winter, 3 Swanst. 578, n.

(a) Lord Carteret v. Paschal, 3 P. W. 197, cited 3 Swanst. 575, and Cas. T. Talb. 222.

(b) Nanney v. Martin, 1 Ch. Rep. 233; Harding v. Edge, 1 Vern. 143.

(c) 3 P. W. 621, 622; 2 Freem. 49.

(d) Bligh v. Earl of Darnley, 2 P. W. 621, 622; Morrice v. Bank of England, Cas. T. Talb. 223; Poly's case, 2 Freem. 49; Astley v. Powis, 1 Ves. 496; Mildred v. Robinson 19 Ves. 588.

(e) Smith v. Eyles, 5 Atk. 385; Perry v. Phelps, 10 Ves. 34.

(f) 3 Ch. Rep. 3; 2 Freem. 153; Cas. T. Talb. 219, 223, 225; 3 Swanst. 576, 577, 581; 2 Atk. 386; 1 Ves. 212.

(g) Nanney v. Martin, 1 Ch. Rep. 233, 1 Ch. Cas. 27; Elvard v. Warren, 2 Ch. Rep. 192; Morrice v. Bank of England, 3 Swanst. 574, 575, 576, Cas. T. Talb. 222, 223; Forbes v. Phipps, 1 Eden, 502, 507.

(h) Shafto v. Powel, 3 Lev. 356; Mason v. Williams, 2 Salk. 507; Jones v. Bradshaw, 3 Ch. Rep. 2; Harding v. Edge, 1 Vern. 143; Searle v. Lane, 2 Vern. 37, 88, 2 Freem. 103; Bligh v. Earl of Darnley, 2 P. W. 621; Joseph v. Mott, Prec. Ch. 79; Bishop v. Godfrey, ib. 179; Morrice v. Bank of England, Cas. T. Talb. 217; Martin v. Martin, 1 Ves. 214; Astley v. Powis, ib. 496; Perry v. Phelps, 10 Ves. 37; Mildred v. Robinson, 19 Ves. 588.

When the executor is sued by one creditor at law, and by another in equity, and in the suit in equity the Court does not assume the general administration of the assets, then, between a judgment obtained by the one creditor, and a final decree by the other, that which was first obtained enjoys the right to be first paid.(i) And after priority gained by the decree, the Court of Equity will secure the payment of this debt, by, if necessary, issuing an injunction to stop the proceedings in the action at law.(j)

SECTION II.

OF AN INJUNCTION BY EQUITY, TO RESTRAIN A CREDITOR'S ACTION AT LAW.

WHEN a suit is instituted in equity against an executor, for payment of money owed by his testator, the bill is filed, sometimes by a single creditor for payment of his own debt only,(k) sometimes by several [*294] creditors, for the like individual *satisfaction,(l) and at other times, and more commonly, by one, or more than one, creditor, for the payment of all the debts of the testator.(m) When the bill is filed for payment of all the debts, the Court takes on itself the general administration of the assets, and by a decree *quod computet* directs the Master to take the accounts between the debtor and all his creditors.(n) When the bill is filed by one, or more than one creditor, for individual satisfaction only, the Court may confine the administration of the assets, and, accordingly, the decree to account, to the exclusive object of the suit.(o) But the Court has, it would seem, the power, in the instance of this bill also, to assume a general administration of the assets.(p) The

(i) Jones v. Bradshaw, 3 Ch. Rep. 2, 2 Freem. 153, Nels. 74, cited Cas. T. Talb. 223, and 3 Swanst. 581; Morrice v. Bank of England, Cas. T. Talb. 217, 3 Swanst. 573, 2 Bro. P. C. ed. Toml. 465, cited 10 Ves. 37, 38; Anon. 2 Freem. 16, Simms v. Barry, S. C., Cas. T. Finch, 413, Sims v. Urry, S. C., 2 Ch. Cas. 225, cited 3 Ves. 580; Martin v. Martin, 1 Ves. 212, 213. See Peplow v. Swinburn, Bunb. 48.

(j) Morrice v. Bank of England, Cas. T. Talb. 217, 219, 226, 3 Swanst. 583; Martin v. Martin, 1 Ves. 213. See also 10 Ves. 40.

(k) Anon. cited 1 Ves. 213; Anon. 3 Atk. 572. It appears that formerly the bill was brought merely for a discovery of assets, without praying an account; and that to prevent multiplicity of suits, an account may now at the same time be prayed, and the Court will accordingly direct an account to be taken. (Amb. 55.) And although on a bill for a discovery of assets, the Creditor has a double remedy, namely, at law and in equity, yet equity saves him this expense, and does not oblige him to sue doubly, in

one Court for an account of assets, and in another satisfaction, but itself decrees him satisfaction. 2 Atk. 363; 2 Ves. 106; Amb. 331.

(l) Morrice v. Bank of England, Cas. T. Talb. 217.

(m) Douglas v. Clay, 1 Dick. 393; Terwest v. Featherby, 2 Mer. 480; Dyer v. Kearsley, *ibid.* 482, n. See also 8 Ves. 520, 522. On cases where two creditors, or other persons, separately file a bill in equity, see Neve v. Weston, 3 Atk. 557; Law v. Rigby, 4 Bro. C. C. 60; Jackson v. Leaf, 1 Jac. & W. 231, 232; Clarke v. Earl of Ormonde, Jacob, 108, 546. And on a bill by some creditors, or legatees, filed in the Exchequer, and by others in Chancery, see Coygarne v. Jones, Amb. 613, and Jackson v. Leaf, 1 Jac. & W. 229.

(n) Douglas v. Clay, 1 Dick. 393.

(o) Morrice v. Bank of England, Cas. T. Talb. 217.

(p) Shepherd, or Sheppard, v. Kent, Prec. Ch. 190, 2 Vern. 435; Anon. 3 Atk. 572. See also 1 Ves. 213, 214.

Court may likewise take into its hands the general administration of the assets, where the bill is filed by the executor, for the direction and indemnity of the Court in payment of the debts;(q) or, for the same purpose, by trustees of the testator's estate;(r) or, where it is filed by residuary or other legatees in his will.(s)

So soon as the Court has, by a decree, assumed the general administration of the assets, it will, on motion only,(t) and without, [*295] *as formerly, a second bill filed for the purpose,(u) interpose by injunction, and stop in its progress to judgment an action at law brought by any creditor for payment of his debt;(v) and although the name of this creditor was, without his consent, inserted in the bill filed on behalf of all the creditors of the testator.(w) And the like injunction may be obtained, not only where the bill is filed by creditors, but also where it is filed by an executor to have the directions of the Court for the execution of the will, and to be indemnified;(x) or, for the same purposes, by trustees of the testator's estate;(y) or where it is filed by a residuary or other legatee.(z) And the injunction may be obtained on the motion of an executor, where the bill is filed by creditors,(a) or by trustees;(b) or on the motion of a creditor, plaintiff, the bill being filed by creditors against the executor;(c) or on the motion of a legatee, by whom the bill is filed against the executor.(d) And an injunction may be obtained to shelter *bona testatoris*, or assets, against execution under a judgment;(e) as where after the decree to account a creditor proceeds to trial at law, and there obtains a verdict;(f) or where after such decree *the executor suffers judgment by default;(g) although so [*296] far as a judgment may affect the *bona propria* of the executor, the executor's own property, the Court will not interfere to protect him.(h) And if a creditor has got a judgment before the decree, then,

(q) *Morrice v. Bank of England*, Cas. T. Talb. 217, 220, 226.

(r) *Brooks v. Reynolds*, 1 Bro. C. C. 183, cited 10 Ves. 39.

(s) 10 Ves. 39, 40; 3 Swanst. 544; *Jackson v. Leaf*, 1 Jac. & W. 229; *Clarke v. Earl of Ormonde*, Jacob, 108, 121, 123, 125.

(t) *Paxton v. Douglas*, 8 Ves. 520; *Gilpin v. Lady Southampton*, 18 Ves. 469.

(u) *Douglas v. Clay*, 1 Dick. 393; *Hardcastle v. Chettle*, 4 Bro. C. C. 163. See also 1 Jac. & W. 232, and Jacob, 124.

(v) *Brooks v. Reynolds*, 1 Bro. C. C. 183; *Kenyon v. Worthington*, 2 Dick. 668; *Goate v. Fryer*, 2 Cox, 201, 3 Bro. C. C. 23; *Hardcastle v. Chettle*, 4 Bro. C. C. 164; *Paxton v. Douglas*, 8 Ves. 520; *Gilpin v. Lady Southampton*, 18 Ves. 469; *Dyer v. Kearsley*, 2 Mer. 482, n.; *Clarke v. Earl of Ormonde*, Jacob, 108; *Lord v. Wormleighton*, ib. 148; *Fielden v. Fielden*, 1 Sim. & St. 255. See also *Drewry v. Thacker*, 3 Swanst. 529. On an injunction to restrain proceedings against real assets descended to the testator's heir at law, see *Martin v. Martin*, 1 Ves. 211, and *Farnham v. Burroughs*, 1 Dick. 63.

(w) *Douglas v. Clay*, 1 Dick. 393, cited 10 Ves. 40.

(x) *Rush v. Higgs*, 4 Ves. 638.

(y) *Brooks v. Reynolds*, 1 Bro. C. C. 183, 2 Dick. 603, cited 10 Ves. 39.

(z) *Jackson v. Leaf*, 1 Jac. & W. 231; *Clarke v. Earl of Ormonde*, Jacob, 108. See also 10 Ves. 39.

(a) *Lord v. Wormleighton*, Jacob, 148. On the duty of the executor to apply for the injunction, and on his responsibility if, after the decree to account, he permits the creditor to obtain judgment, and to take the property of the testator in execution, see *Clarke v. Earl of Ormonde*, Jacob, 122.

(b) *Brooks v. Reynolds*, 1 Bro. C. C. 183. See also 1 Jac. & W. 231, 232.

(c) *Dyer v. Kearsley*, 2 Mer. 482, n.; *Cox v. King*, ibid. 483, n.

(d) *Clarke v. Earl of Ormonde*, Jacob, 108, 122, 125. See also 3 Swanst. 544.

(e) *Brook v. Skinner*, 2 Mer. 481, n.; *Clarke v. Earl of Ormonde*, Jacob, 124.

(f) *Lord v. Wormleighton*, Jacob, 148.

(g) *Dyer v. Kearsley*, 2 Mer. 482, n.

(h) *Brook v. Skinner*, 2 Mer. 481, n.; *Terrewest v. Featherby*, ib. 480; *Clarke v. Earl of Ormonde*, Jacob, 124. See also on a judgment *de bonis propriis* of a personal representative, *Drewry v. Thacker*, 3 Swanst. 529.

after the decree, although such creditor may come in and prove as a judgment creditor, yet the Court will on application grant an injunction to prevent him from taking out execution against the assets.(i)

In a late case an injunction was granted to restrain an action brought by a lessor against executors, as executors, for breaches of the covenant to repair contained in his lease; and the Court referred it to the Master, to ascertain whether any breach of covenant had been committed, and the amount of the damages.(j)

An injunction to restrain a creditor from proceeding at law against assets was at first granted, where one creditor, by whom a bill was filed for payment of his own debt only, had obtained a *final* decree; and another creditor sued at law for his debt; and then the injunction issued, to protect the creditor by final decree against the effect of the action at law. And it was granted on these principles,—That in a Court of Equity a final decree is, for the purpose of payment out of personal assets, equal to a judgment at law; and that as the decree cannot, like a judgment, be pleaded by the executor in an action at law against him, the Court of Equity is called on to support its own jurisdiction, by supplying a protection equivalent to the plea of a judgment.(k) The like injunction came afterwards to be used, and is now constantly issued, in cases where the Court of Equity takes on itself the general administration of the assets of a testator or intestate. And here it is issued before the final decree, and at any time after the decree to account. The principle of the injunction in this case is, that as the Court exercises a jurisdiction to [*297] decree a *general administration of the assets, it is, if it desires to sustain this jurisdiction, obliged to support its own decree, and to save the executor from the difficulty into which he would be thrown, if when the decree calls on him to administer in a Court of Equity, a creditor could call on him to administer out of it, by suing him at law, where the decree cannot be pleaded.(l) The same difficulty to the executor, and necessity of supporting the jurisdiction of equity, are the causes that, in equity, the decree to account is in nature of a judgment for all the creditors; in the sense, that afterwards all the creditors are so far equal, that no one can now obtain priority by procuring judgment at law.(m)

This injunction proved, however, at one time, not only to be the cause of considerable hardship to the particular creditor, against whom it issued, but also to be in many cases an inlet to much fraud and injury towards the whole body of creditors. As it clearly may be the interest of the rest of the creditors to stop the proceedings at law, and by this means to frustrate the meditated priority over themselves, it can seldom be difficult to institute in equity a suit against the executor; who is indeed allowed to file, in the name of a creditor, a bill against himself.(n) An executor, therefore, whose object in the bill or injunction was not

(i) Jacob Rep. 124. See *Surrey v. Smalley*, 1 Vern. 3d ed. 457, and n. (1). On restraining execution under a judgment *de bonis propriis* obtained before the decree, see *Drewry v. Thacker*, 3 Swanst. 529.

(j) *Sutton v. Mashiter*, 2 Sim. 513.

(k) *Martin v. Martin*, 1 Ves. 212, 213; *Perry v. Philips*, 10 Ves. 40.

(l) 2 Dick. 669; 8 Ves. 520, 521; 10 Ves. 40; 18 Ves. 470; 1 Sch. & Lef. 299.

(m) 2 Cox, 202; 8 Ves. 520, 521; 10 Ves. 40; 18 Ves. 470; Jacob, 123, 124; 1 Sch. & Lef. 299.

(n) 18 Ves. 469.

to prevent the preference of one creditor, or to promote the just payment of all, but from undue motives to keep the assets in his own hands, out of which an execution at law might speedily take them, a design furthered besides, in some instances, by a friendly creditor, might formerly with great ease attain his object, by means of a suit in equity, hastened with the ready aid of the bulk of the creditors on to a decree and injunction. (o) The mischief which resulted from this state of the law led to a practice introduced by either Lord Rosslyn (p) or Lord Eldon, (q) and which is, to take the opportunity afforded by the application for an *injunction, to endeavour to secure the assets, which the executor has in his hands. The executor's answer to the bill [*298] ought to set forth what the assets are; (r) but where it does not do this, the Court, when the injunction is asked for, endeavours by other means to know the state of them. (s) The means commonly used is, to require the executor to make an affidavit as to what assets he has in his hands. (t) It seems, however, not to be an absolute rule to refuse an injunction, unless there is such an affidavit. (u) But when the assets are by some mode ascertained, as by either the answer or affidavit, the Court when it grants the injunction exercises a discretion on the disposal of them; (v) sometimes, and usually it is believed, compelling the executor to bring them into Court, and making such order as the state of the assets requires. (w)

SECTION III.

OF CASES WHEREIN A CREDITOR'S ACTION AT LAW IS UNIMPEDED AND FAVOURED IN EQUITY.

THE right, which a creditor has to sue at law an executor, is in many instances unimpeded and favoured by a Court of Equity; notwithstanding it will, in certain cases, issue an injunction to stop the proceedings at law.

Where creditors are of equal degree, as two bond creditors, and one of them sues at law, and the other, for the payment of his own debt only, files a bill in equity, and in the latter suit the Court does not take on itself the general administration of the assets; here, notwithstanding the bill brought, the executor may *afterwards confess judgment at law; and payment by him of this judgment debt [*299] will be allowed in equity. (x)

An important difference is taken between a *final* decree, or decree

(o) 8 Ves. 520, 522; 18 Ves. 470; 3 Swanst. 544; Jacob, 125.

(p) 8 Ves. 521.

(q) 18 Ves. 470; Jacob, 125.

(r) 8 Ves. 522; 18 Ves. 470; Jacob, 125.

On the responsibility of a solicitor, concerned in an amicable suit of this nature, if the assets are not set forth in the answer, and they are afterwards wasted by the executor, see 8 Ves. 522, and 3 Swanst. 546.

(s) 3 Swanst. 546.

(t) Paxton v. Douglas, 8 Ves. 520; Gilpin v. Lady Southampton, 18 Ves. 470; Clarke v. Earl of Ormonde, Jacob, 108, 125.

(u) 3 Swanst. 546.

(v) Jacob Rep. 125.

(w) Paxton v. Douglas, 8 Ves. 520; Gilpin v. Lady Southampton, 18 Ves. 470; Clarke v. Earl of Ormonde, Jacob, 125.

(x) Goodfellow v. Burchett, 2 Vern. 298, 299; Smith v. Eyles, 3 Atk. 385.

which orders a debt to be paid, and a decree *quod computet*, or one by which reference is made to the Master to take the account between the plaintiff and his debtor. Between a judgment and final decree, the one which is first in time enjoys, it has been seen, the right of first payment. (y) But when one creditor sues at law, and another for payment of his own debt only files a bill in equity, and in the latter suit the Court does not assume the general administration of the assets, and a decree *quod computet*, or to take an account between the plaintiff and his debtor, is obtained; and after this decree, and before or after the Master's report, or at any time before the final decree, the suitor at law obtains there judgment; this judgment debt is entitled to priority of payment before the debt that may be found to be due on the account decreed: (z) and, accordingly, a Court of Equity will decree it to be first paid, (a) and the executor is justified in paying it, notwithstanding the previous decree to account. (b) And the judgment bears this priority, at least in a case where the two creditors are of equal degree, although such judgment is confessed by the executor after the decree to account. (c)

When a bill is filed on behalf of all the creditors of the testator, a suit in which the Court does assume the general administration of the assets, here, until the decree *quod computet*, or other decree which makes that assumption, is pronounced, a creditor, at least one who is not expressly a consenting party to the suit, (d) has the power by gaining judgment at law to acquire a priority, so far as to come in under the decree, and prove [*300] as a judgment creditor; (e) but not, it seems, to the extent to prevent after the decree an injunction against execution under the judgment. (f)

Where in an action at law brought by a creditor, the executor pleaded the general issue, *non assumpsit*, on which issue a verdict was found for the plaintiff; and on a bill filed by the executor for the direction and indemnity of the Court in the execution of the will, the executor procured the common injunction; and on the answer coming in an order for dissolving the injunction *Nisi* was obtained; the Court, before it had assumed the general administration of the assets by a decree to account, and under which decree the creditor, and plaintiff at law, could come in, refused to continue the injunction. And the consequence seems to have been, that, at least until that decree, the creditor was allowed to take the whole benefit which the law gave him under the judgment; which, by reason of the plea of the general issue and verdict for the plaintiff, was evidence of assets in the executor's hands. (g)

A creditor, who at law sues the executor, is entitled to be paid out of the assets his costs of the action up to the time when he had notice of the decree, by which the general administration of the assets is assumed. (h)

(y) *Morrice v. Bank of England*, Cas. T. Talb. 217.

(z) *Mason v. Williams*, 2 Salk. 507; *Martin v. Martin*, 1 Ves. 213. See also *Anon.* 2 Freem. 16; and *Joseph v. Mott*, Prec. Ch. 79, cited 3 Swanst. 577.

(a) *Smith v. Eyles*, 2 Atk. 385; *Ferrers v. Shirley*, cited 10 Ves. 39.

(b) *Perry v. Phelps*, 10 Ves. 34.

(c) *Smith v. Eyles*, 2 Atk. 385; *Goodfellow v. Burchett*, 2 Vern. 299.

(d) See *Shepherd, or Sheppard, v. Kent*, Prec. Ch. 190, 193, 3 Vern. 435.

(e) *Douglas v. Clay*, cited 10 Ves. 40, and reported 1 Dick. 393; *Clarke v. Earl of Ormonde*, Jacob, 124; *Rodenhurst v. Tudman*, 1 Turn. & R. 305; *Largan v. Bowen*, 1 Sch. & Lef. 299.

(f) *Jacob Rep.* 124.

(g) *Rush v. Higga*, 4 Ves. 638, cited 1 Sch. & Lef. 299.

(h) *Goate v. Fryer*, 2 Cox, 201, 3 Bro.

In many cases, it may here be repeated, the *bona propria* of the executor are not protected in equity against execution under a judgment at law.(i)

*CHAPTER XXV.

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OF THE COSTS OF AN ACTION BROUGHT BY A CREDITOR AGAINST THE EXECUTOR; AND OF THE EXECUTOR'S LIABILITY, IN CERTAIN CASES, TO PAY OUT OF HIS OWN PROPERTY, SOMETIMES THE COSTS, AND SOMETIMES BOTH DEBT AND COSTS.

WHEN, to recover a debt due by a testator, an action is brought against his executor, the executor is often not, either personally or out of present assets, liable to pay costs;(a) although it seems the creditor may sometimes be entitled to costs out of assets *quando acciderint*.(b)

In some cases the creditor is liable to pay to the executor his costs of the action. And, on the contrary, the executor may, by means of his pleading, become in other instances subject to pay out of his own property, in an action of debt, sometimes the damages and costs of the action, and in other cases, not only the damages and costs, but the debt also; and in an action of *assumpsit* sometimes the costs, and in other cases both damages and costs.(c) In *assumpsit* the damages constitute the debt recovered;(d) and in debt, although in reality the damages recovered for the detention of the debt, and the costs, seem to be distinct sums,(e) yet both costs and damages may, it should seem, be *adjudged to be levied under the common name of damages,(f) a word [*302] that in other cases also seems to include costs.(g)

If to an action of *assumpsit* the executor pleads *plene administravit*, and also pleads *non assumpsit*, or *non assumpsit* and the Statute of Limitations, or *non assumpsit* and *ne unques executor*; and the plaintiff omits to pray judgment of assets *quando acciderint*, and joins issue on each of those pleas; and on the plea of *non assumpsit*, or each of the pleas *non assumpsit* and the Statute, or *non assumpsit* and *ne unques executor*, a verdict is found for the plaintiff, but on the plea *plene ad-*

C. C. 23; Paxton v. Douglas, 8 Ves. 520; Dyer v. Kearsley, 2 Mer. 482, n.; Drewry v. Thacker, 3 Swanst. 538, 541; Jackson v. Leaf, 1 Jac. & W. 231; Clarke v. Earl of Ormonde, Jacob, 124, 125; Lord v. Wormleighton, ib. 148; and see Curre v. Bowyer, 3 Madd. 456.

(i) Terrewest v. Featherby, 2 Mer. 480; Brook v. Skinner, ib. 481, n.; Clarke v. Earl of Ormonde, Jacob, 124.

(a) Batt v. Deschamps, 2 Tidd, 9th ed. 980.

(b) De Testat v. Andrade, 1 Chit. Rep. 629, n.; 2 Tidd, 9th ed. 980; 1 Saund. 5th ed. 336 b.

(c) On an executor's relief in equity, in cases where he has mispleaded at law, see

Anon. 1 Vern. 119; Robinson v. Bell, 2 Vern. 146; and Stephenson v. Wilson, ib. 325.

(d) 1 Ld. Raym. 254; 2 Salk. 623; 12 Mod. 153; 3 Bl. Com. 155, 156.

(e) Mary Shipley's case, 8 Co. 134, 1 Rol. Abr. 928, Y. 1; Street v. Wise, 1 Rol. Abr. 930; Mounson v. Bourne, ib. 930, 933; Howard v. Jemmet, 1 W. Bl. 400; Burroughs v. Stevens, 5 Taunt. 554.—12 Mod. 153; 2 Salk. 623.

(f) Erving v. Peters, 3 Durn. & E. 685, 688; Burroughs v. Stevens, 5 Taunt. 554.

(g) Pilfold's case, 10 Co. 115 b.; Lawson v. Story, 1 Ld. Raym. 19; Phillips v. Bacon, 9 East, 304.

ministravit for the defendant, the plaintiff must pay the defendant, the executor, his general costs of the action. *(h)*

On the other hand, if to an action of *assumpsit* the defendant pleads *plene administravit* and also *non assumpsit*; and on the plea *plene administravit* the plaintiff takes judgment of assets *quando acciderint*; *(i)* and on the plea *non assumpsit* a verdict is found for the plaintiff; here, as by the plea of *non assumpsit* the plaintiff was by the executor compelled to go down to trial, in order to avail himself of the judgment of assets *quando acciderint*, the plaintiff is entitled to judgment to levy the damages and costs *de bonis testatoris*, *et si non* to levy the costs *de bonis propriis* of the executor. *(j)* And if in *assumpsit* the executor pleads *plene administravit*, and *plene administravit ultra* what is due on bond, and farther pleads *non assumpsit*; and on the plea *plene administravit ultra* the plaintiff takes judgment of assets *quando acciderint*; and on the plea *plene administravit* a verdict is found for the defendant, but on the plea *non assumpsit* for the plaintiff; here, for the like reason, the creditor is entitled to a similar judgment. *(k)*

[*303] Many other cases occur wherein, on an action against an executor *the judgment to levy the debt is confined to the *bona testatoris* only; *(l)* although, in these and other instances, the executor may be liable to pay the creditor's costs of the action. *(m)*

If in *assumpsit* the executor pleads *plene administravit*, or *non assumpsit* and *plene administravit*; and on the single plea, or in the other case in both pleas, a verdict is found for the plaintiff; the judgment is not to levy the damages of the executor's goods and chattels, but is to levy the damages and costs *de bonis testatoris*, *et si non* to levy the costs *de bonis propriis* of the executor. *(n)* And if in an action of debt, as on a bond, the executor pleads *plene administravit*, or *non est factum* and *plene administravit*; and on the single plea, or in the latter case on both pleas, a verdict is found for the plaintiff; the judgment is to levy the debt, and damages, and costs *de bonis testatoris*, *et si non* to levy the damages and costs *de bonis propriis* of the executor. *(o)*

When, to recover a debt due by a testator, an action is brought against the executor, and he puts in a single plea, which, in the consideration of the Courts of Law, in other words, which legally is within the executor's own knowledge false, the judgment against him is, to levy the debt and costs *de bonis testatoris*, *et si non* to levy both debt and costs *de bonis propriis*. *(p)* A false plea of *ne unques executor* is a plea of the character

(h) Hogg v. Graham, 4 Taunt. 135; Ragg v. Wells, 8 Taunt. 129; Edwards v. Bethel, 1 Barn. & Ald. 254.

(i) See Noell v. Nelson, 2 Saund. 214, 226.

(j) Marshall v. Willder, or Wilder, 9 B. & C. 655, 4 Mann. & Ryl. 607.

(k) Hindsley v. Russell, 12 East, 232.

(l) 1 Rol. Abr. 928, Y. 3, 5; 929, B. 1; 931, D. 1; 1 Brownl. & G. 50.

(m) Twisleton v. Thelwel, Hardr. 165. See also 4 Durn. & E. 648, and 1 Brownl. & G. 50.

(n) Harrison v. Beecles, cited 3 Durn. &

E. 688; Lord v. Wormleighton, Jacob, 148; Fielden v. Fielden, 1 Sim. & St. 255; Marshall v. Willder, or Wilder, 9 B. & C. 658, 4 Mann. & Ryl. 609, 611.

(o) Mary Shipley's case, 8 Co. 134; Howard v. Jemmet, 1 W. Bl. 400, 3 Burr. 1368; Erving v. Peters, 3 Durn. & E. 685, 688; Fielden v. Fielden, 1 Sim. & St. 255. See Terwest v. Featherby, 2 Mer. 480, cited Jacob Rep. 150.

(p) 1 Rol. Abr. 930, 933; Palm. 279, 280; 9 B. & C. 658; 4 Mann. & Ryl. 609, 611; Burroughs v. Stevens, or Stephens, 5 Taunt. 554, 1 Marsh. 211.

mentioned, and therefore draws to it such a judgment *de bonis propriis*. And a false and single plea of a release actually executed to the executor seems to be of the like kind, and to be followed by the same effect. (q) And, in an action of debt *on a bond, a false and single plea [*304] of a judgment recovered against the executor on the same bond, shares perhaps the same nature and consequence. (r) But a plea may be false in the popular meaning of the word, and in this sense be within the executor's own knowledge false, and yet not be legally false. A plea of *plene administravit*, or *non assumpsit*, or *non est factum*, may be of this nature. Although, popularly speaking, it may be false, and known to be so by the executor, yet it is not legally false. (s) "What is a false plea within the executor's own knowledge, which renders the executor liable *de bonis propriis*, is," observes Gibbs, Ch. J., "a matter of very considerable difficulty. The pleas of *ne unques executor*, and of release actually executed to the executor, are such: but many pleas, as *plene administravit*, to the view of an illiterate person appears such, which are not so; for many cases hold, that *plene administravit* is not a plea of that character." (t)

But, farther, an executor may become eventually liable to satisfy a debt and costs out of his own property, although he has not pleaded a plea legally false. This may happen where he has wasted the property of the testator. (u) It may happen where the executor has confessed judgment, or suffered judgment by default; or where he has pleaded one or more than one plea, not legally false, but has not by a plea *plene administravit*, or other plea, denied assets; and a verdict on the single plea, or, according to the case, on each of the several pleas, is given against him. (v) The omission to plead a deficiency of assets is construed to be a confession of assets. (w) And the judgment against the executor is evidence of a *devastavit*. (x) And it is a rule, that if a person, when called on to plead to an action brought against him, is *pos-
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sessed of the knowledge of matter which he might then plead, and omits to do so, and judgment is obtained against him, he cannot afterwards plead that matter on a *scire fieri* (y) inquiry, or action of debt on the judgment. (z) And, therefore, if an action of debt suggesting a *devastavit* is brought on the judgment obtained against the executor, he cannot now plead a deficiency of assets, or *plene administravit*, (a) or a judgment against his testator, (b) or against himself, (c) or a

(q) Bull v. Wheeler, Cro. Jac. 647; Bridgman v. Lightfoot, ib. 671; Anon. Noy, 69.—1 Anders. 150; Dalis. 71; Jenk. Cent. C. 8, Ca. 23. See also 1 Rol. Abr. 930, 933; 1 Atk. 293; 5 Taunt. 556, 557; 9 B. & C. 658; and Edwards v. Bethel, 1 Barn & Ald. 254.

(r) Burroughs v. Stevens, 5 Taunt. 554, 556. See, however, Borret v. Boyes, 1 Rol. Abr. 931, D. 6.

(s) 1 Rol. Abr. 931, D. 5; 3 Durn. & E. 688; 5 Taunt. 557; Jacob, 150; 1 Sim. & St. 255.

(t) 5 Taunt. 556, 557.

(u) 1 Rol. Abr. 932, F.

(v) Ramsden v. Jackson, 1 Atk. 292; Erving v. Peters, 3 Durn. & E. 685.

(w) 1 Salk. 310; 1 Ld. Raym. 590; 1 Atk. 294; 3 Durn. & E. 690, 691. See also Rush v. Higgs, 4 Ves. 638.

(x) Erving v. Peters, 3 Durn. & E. 685.

(y) See 1 Saund. Rep. ed. Wms. 219, n. (8), 5th ed. 219 a.; and 2 Tidd's Pr. 9th ed. 1025, 1113, 1114.

(z) 1 Ld. Raym. 590; 2 Stra. 732; 1 Atk. 293; Cowp. 728; 3 Durn. & E. 689.

(a) Ramsden v. Jackson, 1 Atk. 292; Skelton v. Hawling, 1 Wils. 258; Erving v. Peters, 3 Durn. & E. 685.

(b) Earle v. Hinton, 2 Stra. 732.

(c) Rock v. Layton, or Leighton, 1 Ld. Raym. 589, 1 Salk. 310, Com. 87; and stated from a Manuscript of Lord C. J. Holt, Durn. & E. 690.

debt by bond recovered by judgment against him since the judgment in the former action, and by which a simple contract debt was recovered. (d) And if the original action against the executor, and on the judgment in which the present action suggesting a *devastavit* is brought, was an action of debt, and the executor did not in such original action, by the plea *plene administravit*, or other plea, deny assets, but put in several pleas not legally false, and a verdict on each of them was found for the plaintiff, the judgment obtained in that action is, it appears, to levy the debt and damages and costs *de bonis testatoris, et si non* to levy the damages and costs *de bonis propriis* of the executor. (e) And in the action of debt suggesting a *devastavit* brought on this judgment, the judgment seems to be, to levy the debt and damages and costs *de bonis testatoris, et si non* to levy the debt and damages and costs *de bonis propriis* of the executor. (f)

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*CHAPTER XXVI.

OF A LESSOR'S ACTION FOR RENT, AND ON COVENANTS, UNDER A LEASE FOR YEARS.

- SECT. I. *Of a Lessor's Action for Rent, due after the Lessee has assigned the Term.*
 II. *Of a Lessor's Action for Rent, due before the Lessee's Executor has assigned the Term.*
 III. *Of a Lessor's Action on Covenants, broken before the Lessee's Executor has assigned the Term.*
 IV. *Of a Lessor's Action for Rent, due after the Lessee's Executor has assigned the Term.*
 V. *Of a Lessor's Action on Covenants, broken after the Lessee, or his Executor, has assigned the Term.*

SECTION I.

OF A LESSOR'S ACTION FOR RENT, DUE AFTER THE LESSEE HAS ASSIGNED THE TERM.

BETWEEN a lessor and his lessee for years, there are a privity of contract and a privity of estate. (a) And, as to an action of debt for the rent reserved in the lease, the privity of contract is personal, and "holds only between the lessor himself and the lessee himself." (b) If a lessee for

(d) *Britton v. Bathurst*, 3 Lev. 113.(e) *Erving v. Peters*, 3 Durn. & E. 685, 688.(f) *Ibid.* See also 1 Brownl. & G. 50, and 4 Durn. & E. 637; likewise *Pettifer's case*, 5 Co. 32; *Mounson v. Bourn*, Cro. Car. 518, 527; *Merchant v. Driver*, 1 Saund.307, 1 Vent. 20; and *Blackmor v. Mercer*, 2 Saund. 5th ed. 402 a., 1 Vent. 221.

(a) 3 Co. 23 a.; 8 Co. 42 b.; Co. Litt. 271 a.; Cro. Eliz. 556.

(b) 3 Co. 23 a., 23 b., 24 a. See 1 Brod & B. 263

years assigns the term, then, on the privity of contract between the lessor and lessee, the lessor may, until he has accepted of the assignee as his tenant, bring an action of debt against the lessee, for rent due after the *assignment.(c) But this action of debt the lessor cannot [* 307] maintain, after he has taken rent of the assignee, and so accepted him as his tenant,(d) for this acceptance extinguishes the privity of contract.(e)

If the lessee assigns the term, and dies, and the lessor has not accepted of the assignee as his tenant, the lessor cannot, on a privity of contract between himself and the executor of the lessee, support against the executor an action of debt in the *debet* and *detinet*, for rent due after the lessee's death.(f) But in this case, on the privity of contract between the lessor and lessee, the lessor may, it would seem, maintain against the executor of the lessee an action of debt in the *detinet*, for rent due after the assignment, and in the lessee's life-time ; or for rent due after the lessee's death.(g)

SECTION II.

OF A LESSOR'S ACTION FOR RENT, DUE BEFORE THE LESSEE'S EXECUTOR HAS ASSIGNED THE TERM.

WHEN a lessee for years dies, and the term devolves to his executor, then for rent, wholly incurred in the lessee's life-time, the lessor may bring against the executor an action of debt, not in the *debet* and *detinet*, but, on the privity of contract between the lessor and lessee, in the *detinet* only;(h) and judgment for the plaintiff is *de bonis testatoris*.(i) After the death of the lessee, his executor, who accepts the executorship, and possesses assets, cannot wave the term, and refuse to pay, so far as the assets are sufficient, the rent that grows due after the lessee's *death; although such rent is greater than the value of the [*308] land:(j) "an executor cannot wave a term so, but that he shall be charged for the rent, if he has assets; for he is bound to perform all contracts of the testator, if he has assets, be the rent above the value of the land or not."(k) But although on the death of the lessee, his executor, who accepts the executorship, cannot wave the term, in the sense that he cannot avoid the vesting of it in him, and certain consequences of this vesting, yet it appears that, if not in all cases, in some instances, and in particu-

(c) Walker's case, or Walker v. Harris, 3 Co. 22, Mo. 351; Humble, or Ungle, v. Glover, Cro. Eliz. 328, and stated 3 Co. 23 b., 24 a.; Overton v. Sydal, Cro. Eliz. 556.

(d) Walker's case, 3 Co. 24 b.; Marsh v. Brace, Cro. Jac. 334; Thursby v. Plant, 1 Saund. 240, 1 Lev. 260; Auriol v. Mills, 4 Durn. & E. 98.

(e) 1 Saund. Rep. 240.

(f) 3 Co. 24 a.; Cro. Eliz. 556; Palm. 117.

(g) Cro. Eliz. 556; 1 Lev. 127; 3 Mod. 326, 327; 1 Freem. 338.

(h) Bro. Abr. tit. *Dette*, 178; Cro. Eliz. 712; Style, 61; 1 Rol. Abr. 603, S. pl. 9; Salter v. Codbold, 3 Lev. 74.

(i) Salter v. Codbold, 3 Lev. 74.

(j) Bro. Abr. tit. *Waiver*, 49; Cro. Jac. 549; 1 Ventr. 271; 1 Freem. 394; 1 Salk. 297; 1 Mod. 186; Yelv. 103. See also on waiver of a term, Paule v. Moodie, 2 Rol. Rep. 131; Moule v. Moodie, Palm. 116; Bolton v. Canham, Pollexf. 125; and Haydon v. Godsale, Palm. 150.

(k) 1 Lev. 127.

lar if "the rent is more than the land is worth,"^(l) the executor may wave the occupation of the land, or, in other words, is not obliged to enter.^(m)

If the executor *does* enter, then for rent incurred partly in the lessee's life-time, and partly in the time of the executor, it appears the lessor may bring against the executor an action of debt in the *debet* and *detinet*.⁽ⁿ⁾ Also for such rent, the lessor may sue the executor in the *detinet* only.^(o) If the executor does *not* enter, then for rent wholly incurred in the executor's time, the lessor may, on the privity of contract between himself and the lessee, bring against the executor an action of debt in the *detinet*.^(p) If the executor *does* enter, then between him and the lessor there is a privity of estate;^(q) but, as to an action of debt for rent, not a privity of contract.^(r) And therefore for rent wholly incurred in the executor's time, the lessor cannot, on a privity of *contract* between him [*309] and the executor, support against the executor an action of debt in the *debet* and *detinet*.^(s) *To pay such rent, the profits of the land are, as well as the lessee's general assets, liable. And so much are those profits responsible for the rent, that it is the duty of the executor to apply them in satisfaction of it,^(t) and the surplus only, which remains after payment of the rent, is assets of the lessee.^(u) And, for this cause, in an action of debt by the lessor against the executor for such rent, wholly incurred in the executor's own time, the executor may be charged, as assignee,^(v) in the *debet* and *detinet*.^(w) And if to this action he pleads, that he has fully administered the assets, *plene administravit*, the plea is bad,^(x) and a cause of demurrer.^(y) And when in such action of debt in the *debet* and *detinet*, judgment is given for the plaintiff, it is *de bonis propriis* of the executor.^(z) And here it may be mentioned, that if a lessee for years assigns the term, and, on the death of the assignee, the term devolves to his executor, who enters, then, for rent wholly incurred after the assignee's death, the lessor may sustain against his executor an action of debt in the *debet* and *detinet*.^(a)

When an executor is charged in the *debet* and *detinet*, and the rent is

(l) Style, 61; Palm. 117.

(m) Lord Rich v. Frank, 1 Bulstr. 23; Kale v. Jocelyne, Style, 61; Sackvill v. Evans, 1 Freem. 172. See also Moule v. Moodie, Palm. 117.

(n) Bailiffs of Ipswich v. Martin, Cro. Jac. 411; Jevens v. Harridge, 1 Saund. 1.

(o) Aylmer v. Hide, Selw. N. P. 8th ed. 607. And see 4 M. & S. 125.

(p) Cro. Eliz. 556; 1 Bulstr. 23; 1 Lev. 127. See also Howse v. Webster, Yelv. 103.

(q) Cro. Eliz. 556; Cormel v. Lisset, 2 Lev. 80.

(r) 3 Co. 23 a., 23 b.

(s) 3 Co. 23 b.; Cro. Eliz. 556.

(t) 1 Salk. 317.

(u) 5 Co. 31 b.; Cro. Eliz. 712; Mo. 566; 1 Salk. 79; 1 Freem. 337, 394; 10 Mod. 12.

(v) 1 Bulstr. 23; 1 Salk. 317; 1 Freem. 337; Cormel v. Lisset, 2 Lev. 80.

(w) Bro. Abr. tit. *Dette*, 178; Barrington

v. Potter, 1 Dyer, 81 b.; Hargrave's case, or, Body v. Hargrave, 5 Co. 31, Mo. 566, Cro. Eliz. 711, cited Cro. Jac. 546, 549, and 1 Keb. 923; Lord Rich v. Frank, Cro. Jac. 238, 1 Bulstr. 23; Bolton v. Cannon, 1 Vent. 271, 1 Freem. 393; Boulton v. Cannam, 3 Keb. 446, 466, 493; Bolton v. Cannam, Pollexf. 125; Cormel v. Lisset, 2 Lev. 80; Sackvill v. Evans, 1 Freem. 171; Anon. 1 Mod. 185;—Cro. Eliz. 556; 1 Rol. Abr. 603, pl. 10; 1 Lev. 128; 1 Salk. 297, 317; 1 Freem. 337, 338.

(x) 1 Salk. 317.

(y) Sackvill v. Evans, 1 Freem. 171; Anon. 1 Mod. 185. See also Moule v. Moodie, Palm. 116.

(z) Lord Rich v. Frank, 1 Bulstr. 23; Sackvill v. Evans, 1 Freem. 171; Royston v. Cordyre, Ayleyn, 42, cited 3 East, 6; Salter v. Codbold, 3 Lev. 74.—1 Rol. Abr. 931, C. pl. 10.

(a) Mawle v. Cacyffer, Cro. Jac. 549.

greater than the value of the land, he may aid himself by special pleading. (b) *Billinghurst v. Speerman* is thus reported:—"If an executor has a term, and the premises are of less value than the rent reserved thereon, in an action brought against him in the *debet* and *detinet*, he may plead the special matter, namely, *that he has no assets, and that the land is of less value than the rent, and demand [*310] judgment if he ought not to be charged in the *detinet* only. This, Holt, Ch. J., said was his opinion, and that Hale was of the same opinion and it was but reasonable, because an executor could not waive for the term only; for he must renounce the executorship *in toto* or not at all. (c) And in *Buckley v. Pirk*, it was held, "That if the executor of a lessee enters, the lessor may charge him, as an assignee, for the rent incurred after his entry, in the *debet* and *detinet*; and if the rent be of less value than the lands, as the law *prima facie* supposes, so much of the profits, as suffices to make up the rent, is appropriated to the lessor, and cannot be applied to any thing else. And therefore, in such case, the defendant cannot plead *plene administravit*, for that confesses a misapplication, since no other payment out of the profits can be justified, till the rent be answered. On the other hand, if the rent be worth more than the land, the defendant may disclose that by special pleading, and pray judgment whether he shall be charged otherwise than in the *detinet* only." (d)

When a lessee for years dies, and his executor enters, it appears it is in the election of the lessor, in an action of debt for rent wholly incurred in the executor's own time, to charge the executor in the *debet* and *detinet*, or in the *detinet* only; and that if he charges him in the *detinet* only, the judgment against the executor is *de bonis testatoris*. (e) An action of debt lies not by the lessor against the executor of the lessee for rent, to charge him in the *detinet* for one sum due in the life-time of the testator, and in the *debet* and *detinet* for another sum due in the executor's own time; because these charges require several judgments; namely, *de bonis propriis* for the arrears in the executor's own time, and *de bonis testatoris* for the arrears incurred in the testator's time. (f) In *Remnant v. Bremridge*, after the death of a *lessee for years, [*311] his administrator entered, and, for rent due after the lessee's death, the owner of the reversion, by assumpsit for use and occupation, sued the administrator as assignee. The defendant pleaded the general issue; and under it gave in evidence, that the intestate's estate was insolvent, that the defendant had received no profits from the premises, and that, eight months after the intestate's decease, the defendant made to the plaintiff a verbal offer to give up the premises to him. This evidence was held to be a good defence to the action; and, accordingly, a nonsuit was entered. (g)

(b) Cro. Jac. 549; 1 Vent. 271; 1 Salk. 297, 317.

(c) 1 Salk. 297; Cas. T. Holt, 306. See also Palm. 118.

(d) 1 Salk. 317.

(e) *Boulton v. Canon*, 1 Freem. 337; *Royston v. Cordyre*, Aleyn, 42, cited 3 East, 6. See also 4 M. & S. 125.

(f) *Salter v. Codbold*, 3 Lev. 74.

(g) 8 Taunt. 191, 2 J. B. Moore, 94.

SECTION III.

OF A LESSOR'S ACTION ON COVENANTS, BROKEN BEFORE THE LESSEE'S EXECUTOR HAS ASSIGNED THE TERM.

WHEN an action of covenant is brought against an executor, for a breach of covenant by his testator, a judgment for the plaintiff is *de bonis testatoris*; (h) as, where a lessee covenants to perform the covenants in his lease, and, after his death, his executor is sued for breaches of covenant by the lessee in his life-time; and if the executor of the lessee has no assets, *plene administravit* may be pleaded to the action. (i)

It is decided, that if in a lease for years the lessee covenants to repair the premises (a covenant that runs with the land, (j)) and, after his death, his executor enters, and commits a breach of the covenant, the lessor may sustain an action against him, as assignee. (k) It is also, it should seem, decided, that if the lease is assigned, and after the death of the assignee his executor enters, and commits a breach of the like covenant in the lease, *the lessor may sue this executor, as assignee. (l) And, in either of the cases mentioned, it appears the judgment against the defendant is not against the testator's estate, *de bonis testatoris*, but against the executor's own estate *de bonis propriis*. (m) And, in confirmation of the same doctrine, it is held, that if where a lease for years is assigned by the executor of the lessee, the assignee covenants to repair, and after his death his executor enters, and commits a breach of the covenant, the covenantee, the executor of the lessee, has, in an action on the covenant, his election of charging the defendant as executor or assignee. (n) Some cases occur, wherein a lessee covenanted in the lease, and after his death his executor entered, and broke the covenant; and in an action against him on the covenant, it was decided, the judgment must be *de bonis testatoris*; as, where the executor broke the covenant by not repairing the premises, (o) and, in another case by assigning over the lease, without giving notice thereof to the lessor. (p) But in these instances it can hardly be collected to be the ground of the determination, that the defendant was charged as executor, and not as assignee. (q) In farther cases, a judgment *de bonis testatoris* has been held to be proper, where the lessee entered into a bond for performance of covenants in the lease, and after his death his executor entered, and, having broken a covenant, the lessor recovered against him, in an

(h) *Holt v. Hore*, 1 Rol. Abr. 931, D. pl. 7. See *Dean and Chapter of Bristol v. Guyse*, 1 Saund. 111.

(i) *Wilson v. Wigg*, 10 East, 313.

(j) *Dean and Chapter of Windsor v. Hyde*, 5 Co. 24; Mo. 399;—5 Co. 17 b.; 1 Salk. 317.

(k) *Tilney v. Norris*, 1 Lord Raym. 553; 1 Salk. 309. See also 1 Freem. 337; 3 Keb. 189; and 1 Wils. 5.

(l) *Keeling v. Morrice*, 12 Mod. 371. See *Dean and Chapter of Bristol v. Guyse*, 1 Saund 111.

(m) *Tilney v. Norris*, 1 Ld. Raym. 553, 1 Salk. 309; *Keeling v. Morrice*, 12 Mod. 371.

(n) *Buckley v. Pirk*, 1 Salk. 316.

(o) *Anon.* 3 Dyer, 324 a., Ca. 34; *Collins v. Throughgood*, Hob. 188, 1 Rol. Abr. 932, D. pl. 8. See 3 Keb. 189.

(p) *Bridgman v. Lightfoot*, Cro. Jac. 671, 1 Rol. Abr. 931, D. pl. 8.

(q) See also *Holt v. Hore*, 1 Rol. Abr. 931, D. pl. 8.

action of debt on the bond; as, where the executor broke the covenant by ploughing of marsh land,^(r) and, in another case, by not repairing the premises leased.^(s) It is decided, that when a lessee covenants to pay the rent, and after his death his executor enters, and breaks the covenant, by not paying rent incurred in his own time, and the lessor brings an action of covenant against him, charging him as executor; here, if the *executor has no assets, he may plead *plene administravit*, [*213] and, on demurrer, it will be a good plea to the action.^(t)

The following important case shews, that when a lessee for years specifically bequeaths the premises, his executor is, after his assent to the bequest, and possession taken by the legatee, liable to an action on the lessee's covenant to repair, broken in the time of the legatee. *Curtis v. Hunt* was an action of covenant by the plaintiff, as representative of a lessor, against the defendants, as executors of his lessee, for not repairing. The defendants having pleaded *plene administraverunt*, the probate of the lessee's will was produced, by which it appeared the probate duty had been paid for a sum between 2000*l.* and 5000*l.* The premises in question were bequeathed by the will, and the legatee had been let into possession. The action was brought at the distance of twenty-eight years from the date of the probate, and the plaintiff obtained a verdict; Abbott, Ch. J., observing, "The executors might have taken an indemnity from the legatee. Here is *prima facie* evidence of assets to the amount of 2000*l.*, in the duty paid upon the probate. The executors also might have kept the premises to answer the expenses of repairs. It is unfortunate for the executors; but the lessor must not suffer, because they neglected to do what they might have done."^(u)

In *Sutton v. Mashiter*, the testator in the cause had held a farm and buildings under a lease. The suit was instituted for the administration of his estate. No claim of any debt or damages having been brought in, the Master reported accordingly. The cause was then heard for farther directions; and, in pursuance of the decree, the executors had paid into Court all their balances belonging to the estate. The lessor afterwards commenced an action against the executors, as executors, for breaches of the covenant to repair contained in the lease, and was proceeding to trial at the next assizes; but this action Sir L. Shadwell restrained by injunction, saying, "It is clear that the Court will not allow [*314] *this person, who is in the character of a creditor, to go on with his action. It may be ascertained by the Master, as well as it could be by a jury, whether any breach of covenant has been committed, and what is the amount of the damage; and therefore I shall grant the injunction, without costs, and refer it to the Master, to ascertain the amount of the damages, in respect of the alleged breaches of covenant."^(v)

(r) *Castilion v. Executor of Smith*, Hob. 282, 1 Rol. Abr. 932, D. pl. 9.

(s) *Bull v. Wheeler*, Cro. Jac. 647.

(t) *Boulton v. Canon*, or *Camam*, 1 Freem. 336, 3 Keb. 189; *Lyddall v. Dun-*

lapp, 1 Wils. 4. See *Dean and Chapter of Bristol v. Guyse*, 1 Saund. 111, and *Wilson v. Wigg*, 10 East, 313.

(u) 1 Carr. & P. 180.

(v) 2 Sim. 513.

SECTION IV.

OF A LESSOR'S ACTION FOR RENT, DUE AFTER THE LESSEE'S EXECUTOR HAS ASSIGNED THE TERM.

WHEN, after the death of a lessee for years, his executor enters, then there is between the lessor and executor a privity of estate;(*w*) and the latter is so far assignee, that the lessor may maintain against him, as assignee, an action of debt in the *debet* and *detinet*, for rent incurred in the executor's own time.(*x*) If the executor assigns the term, then immediately on the acceptance of the assignment, and before entry,(*y*) the assignee has an estate,(*z*) and there is between him and the lessor a privity of estate,(*a*) but not of contract;(b) and between the lessor and the executor of the lessee, there is not a privity of contract,(c) or of estate.(d) And now, therefore, the lessor cannot, on a privity of estate between him and the executor, maintain against the executor, as assignee, an action of debt in the *debet* and *detinet*, for rent due after the assignment;(e) and especially if the *lessor has accepted rent from [*315] the assignee of the executor.(f) But on the privity of contract between the lessor and lessee, the lessor may, notwithstanding the assignment, and until he accepts of the assignee as his tenant, maintain against the lessee's executor an action of debt in the *detinet*, for rent become due after the assignment; and if the executor pleads, that before the rent was due he had assigned the term, the plaintiff may demur.(g) To pay this rent so sued for, the lessee's assets are liable; and, therefore, judgment for the plaintiff is *de bonis testatoris*.(h) But it appears the action cannot be sustained, if the lessor has made the assignee his tenant, by acceptance, from the hands of the assignee, of rent due after the assignment.(i)

(w) Cro. Eliz. 556; Cormel v. Lisset, 2 Lev. 80.

(x) Overton v. Sydal, Cro. Eliz. 556; Lord Rich v. Frank, Cro. Jac. 238; Cormel v. Lisset, 2 Lev. 80; Sackvill v. Evans, 1 Freem. 171.

(y) 1 Ld. Raym. 367; 1 Brod. & B. 263.
(z) 1 Ld. Raym. 367.

(a) 3 Co. 23 a.; 1 Brod. & B. 263.

(b) 3 Co. 23 a., 23 b. See, however, 1 Brod. & Bing. 263.

(c) 3 Co. 23 a., 23 b., Cro. Eliz. 556.

(d) 3 Co. 23 a., Cro. Eliz. 556.

(e) Overton v. Sydal, Cro. Eliz. 555, also stated 3 Co. 24 a., and cited 1 Lev. 127; Boulton v. Canon, 1 Freem. 338; Jenkins v. Hermitage, or Armitage, 1 Freem. 377,

3 Keb. 367; Cook v. Harris, 1 Ld. Raym. 367.

(f) Marrow v. Turpin, Cro. Eliz. 715, Mo. 600, and stated 3 Co. 24.

(g) Helier v. Casebert, or Casebrook, 1 Lev. 127, 1 Keb. 679, 839, 923, cited 4 Mod. 76; Coghill v. Freelove, 2 Ventr. 209, 3 Mod. 325; Coghill v. Fairlove, 1 Sid. 266; Coghill v. Fructon, 1 Lev. 128, n.; Boulton v. Canon, 1 Freem. 338.

(h) 1 Lev. 127; 1 Keb. 924; 3 Mod. 326, 327; 1 Freem. 338, 377.

(i) Walker's case, 3 Co. 24 b.; Marsh v. Brace, Cro. Jac. 334; Thursby v. Plant, 1 Saund. 240, 1 Lev. 259; Auriol v. Mills, 4 Durn. & E. 98.

SECTION V.

OF A LESSOR'S ACTION ON COVENANTS, BROKEN AFTER THE LESSEE, OR HIS EXECUTOR, HAS ASSIGNED THE TERM.

WHEN, in a lease for years, the lessee enters into an express covenant, and he assigns the term, and afterwards the covenant is broken, in many cases the lessor may, notwithstanding the assignment, bring an action of covenant against the lessee; as, if the covenant broken is to repair, and the lessee covenanted that he and his assigns would repair. (*j*) And the action may be sustained against the lessee, although brought after the lessor has accepted rent from the assignee, and so taken him to be tenant; (*k*) as, if the covenant broken is to repair, and the lessee covenanted *for himself and his assigns; (*l*) or the covenant broken is to [*316] pay rent. (*m*) And in similar cases the lessor may, after the death of the lessee, bring the action against his executor. (*n*) And, farther, when the assignment of the term is not by the lessee himself, but by his executor, and after this assignment the lessee's express covenant to pay the rent is broken, the lessor may sustain an action of covenant against the executor, charging him as executor. And if the defendant pleads that, before the rent became due, he assigned over, the plaintiff may demur; and judgment for him is *de bonis testatoris*. (*o*) Where a lessee covenanted for himself, his executors, administrators, and assigns, to perform the covenants in the lease; and after his death his executors assigned to D. A.; in an action on the covenant against the executors, by a first count, for breaches of covenant by the testator in his life-time, and by a second count, for breaches by D. A., it was decided, that the testator's funds were liable for any breaches committed by himself, or his executors, or his assigns; that D. A. was an assignee of the testator; and his executors were liable in that character for breaches committed by him; and therefore that *plene administraverunt* might be pleaded to the last count, as well as to the first. (*p*)

*CHAPTER XXVII.

[*317]

OF EQUITABLE ASSETS. (*a*)

ONE division of assets is into *legal* and *equitable* assets. Generally

(*j*) Bro. Abr. tit. *Covenant*, 32; 1 Rol. Abr. 522, N. 2.

(*k*) *Thursby v. Plant*, 1 Saund. 240, 1 Lev. 260; *Auriol v. Mills*, 4 Durn. & E. 98.

(*l*) *Ventrice, or Varnis, v. Goodcheape*, 1 Rol. Abr. 522, N. 1, cited Cro. Jac. 309; *Barnard v. Godschall*, Cro. Jac. 309; *Norton v. Acklane*, Cro. Car. 579.

(*m*) *Countess of Devon v. Collyer*, and

Crofts v. Taylor, 1 Rol. Abr. 522, N. 1. See Cro. Jac. 523.

(*n*) *Bachelour v. Gage*, Cro. Car. 188. See also *Brett v. Cumberland*, Cro. Jac. 521. See, likewise, 1 Meriv. 265.

(*o*) *Jenkins v. Hermitage, or Armitage*, 1 Freem. 377, 3 Keb. 367. See also 1 Meriv. 265.

(*p*) *Wilson v. Wigg*, 10 East. 313.

(*a*) On this subject, see also Chapter VIII.,

speaking, when a creditor by bond, or simple contract, can, by action at law, reach assets, these assets are legal; and, generally speaking, assets are equitable, when, to obtain payment out of them, a creditor by bond, or simple contract, is obliged to go into a Court of Equity. (b) But, under some circumstances, assets may be legal, although, to obtain payment out of them, such a creditor is obliged to resort to a Court of Equity. (c) Legal assets a Court of Equity will distribute, according to the order observed at law in paying the debts of a person deceased. (d) Equitable assets a Court of Equity will distribute among creditors by bond and by simple contract, (e) and, in some cases, by judgment, bond, and simple contract, (f) *pari passu*, or equally.

When a Court of Equity distributes, or administers, legal assets, it allows the different creditors to enjoy the right of priority which they are entitled to at law. (g) And, accordingly, where such assets have consisted of personal estate, the Court has followed the priority observed at law; (h) and paid a debt by decree in Chancery before debts by bond, (i) and debts by bond before debts by simple contract. (j)

[*318] *In the payment of debts of a person deceased, a Court of Equity also respects a specific lien on property liable, as equitable assets, to debts. In *Freemoult v. Dedire*, a person on his marriage covenanted to settle his lands in Rumney Marsh on his wife for her life; after which he made a will, charging all his estate with the payment of his debts; and died indebted by bond and simple contract. On a bill brought by the creditors, Lord Chancellor Parker said, "With regard to the lands in Rumney Marsh, the marriage articles, being a specific lien upon them, make the covenantor, as to them, but a trustee, and, therefore, during the life of the wife, they are not to be affected by any of the bond debts." (k) And in several cases, where property mortgaged has been decreed to be sold for the payment of debts, the first debt which the Court has paid out of the produce of the sale has been that of the mortgagee. (l) In the case also of a mortgage, a Court of Equity respects the general lien of a creditor by judgment against the deceased in his life-time; the Court giving to such judgment a priority before other debts. (m) And when a testator dies indebted by judgment, and land mortgaged by him descends to his heir at law, and a great part, or the whole, of the mortgage debt is by the executor paid out of the personal estate, and the simple contract creditors of the testator apply to a Court of Equity to be paid, out of the land descended, so

Sect. II., on property by or in a Court of Equity held to be assets; and Chapter XXVIII. Sect. II., on marshalling assets for creditors.

(b) 2 Vern. 764; 3 P. W. 342; 2 Atk. 293, 294; Mos. 124, 330; 1 Barn. & C. 374; *Silk v. Prima*, 1 Bro. C. C. 138, n., 1 Dick. 384.

(c) 2 Vern. 764; 10 Mod. 427, 428; 3 P. W. 342, 343.

(d) 2 Vern. 764; 3 P. W. 342, 343; 2 Freem. 49, 50; 1 Barn. & C. 371.

(e) *Deg v. Deg*, 2 P. W. 412. Case of Creditors of Sir C. Cox, 3 P. W. 341.

(f) *Wilson v. Fielding*, 10 Mod. 426, 2

Vern. 763; *Foly's case*, 2 Freem. 49, 2 Eq. Cas. Abr. 459. See also 2 P. W. 416.

(g) 2 Freem. 49; 3 Salk. 83.

(h) *Foly's case*, 2 Freem. 49; *Baily v. Ploughman*, Mos. 95.

(i) *Foly's case*, 2 Freem. 49.

(j) *Anon.* 3 Salk. 83.

(k) 1 P. W. 429. See *Finch v. Earl of Winchelsea*, ib. 377.

(l) *Girling v. Lee*, 1 Vern. 63, and 3d ed. 65, n. (5); *Girling v. Lord Lowther*, 2 Ch. Rep. 262; *Plunket v. Penson*, 2 Atk. 290; *Pope v. Gwyn*, 6 Ves. 28 n.

(m) *Morgan v. Lord Sherrard*, 1 Vern. 293; *Sharpe v. Earl of Scarborough*, 4 Ves. 538. See also *Foly's case*, 2 Freem. 49.

much as the mortgagee has received from the personalty, it appears that Lord Chancellor Parker expressed an opinion that, out of the land, the Court would, in the first place, pay the creditor by judgment.⁽ⁿ⁾

When assets are equitable, a Court of Equity, in the administration of them, acts on the principle, that a debt by simple contract, and a debt by specialty, are equal;^(o) in other words, that "a debt without specialty is as much a debt *jure naturali*, and in conscience, as a debt by specialty,"^(p) "all debts being, in a conscientious regard, equal, and equality the highest equity."^(q) And the same principle the Court extends to judgments.^(r) And, accordingly, out of equitable assets, a Court of Equity decrees to be paid equally, or, as it is usually termed, *pari passu*, or, if the fund falls short, then in proportion, debts by bond and by simple contract,^(s) or debts by judgment, by bond, and by simple contract.^(t)

Lord Chancellor Parker appears to have drawn a distinction between property, which is assets in a Court of Equity only, and certain property, which a creditor cannot come at without the aid of a Court of Equity. He appears to have considered, that a Court of Equity would distribute the former description of property among creditors of different degree *pari passu*; but would distribute the latter kind of property, according to the creditors' priority at law. In *Wilson v. Fielding*, land mortgaged by a testator descended to his heir at law; and a great part of the mortgage debt was, by the executor, paid out of the testator's personal estate. After the testator's death, the plaintiff, one of his simple contract creditor's brought an action at law against his executrix, and obtained judgment; and his other simple contract creditors applying to a Court of Equity, to stand in the place of the mortgagee, and to receive from the land descended so much as he had taken from the personal estate, the Court decreed these creditors, and the creditor by judgment, to be paid equally, refusing to give any preference to the latter. It is reported to be in this case adjudged by Lord Chancellor Parker, that the plaintiff "being only relievable in equity, all the creditors should be paid in proportion, for the judgment could not avail him at law, no assets coming afterwards to the hands of the executors. But if there had been personal assets, as a lease for years, a bond, or the grant of an annuity, in a trustee's name, then, although a "creditor could not come at it, without the aid of a Court of Equity, yet the assets [*320] should be applied in a due course of administration. But in this case, the compelling the heir to refund is a matter purely in equity, and a raising of assets, where there were none at law."^(u)

And, in another case, it appears to have been to the like effect stated by Sir Joseph Jekyll, that "where a bond is due to A., but taken in the name of B., in trust for A., and A. dies, this must be paid in a course of administration." And that "if a term for years be taken in the name of B., in trust for A., this, on the death of A., the *cestui que trust*,

(n) *Wilson v. Fielding*, 10 Mod. 428. See the decree in this case from the Reg. B. 2 Vern. 3d ed. 764, n.

(o) *Willes*, 524; 1 Jac. & W. 45.

(p) 1 Ch. Cas. 248, 249.

(q) 3 P. W. 342.

(r) 2 Freem. 49; 2 P. W. 416.

(s) *Hickson v. Witham*, 1 Freem. 305, 1 Ch. Cas. 248; *Deg. v. Deg.*, 2 P. W. 412; *Wride v. Clarke*, 1 Dick. 382.

(t) *Foly's case*, 2 Freem. 49, 2 Eq. Cas. Abr. 459.

(u) 2 Vern. 763, 10 Mod. 426.

will be legal assets.”(v) The Statute of Frauds, it may here be noticed, makes a trust in fee-simple, descended to the heir of the *cestui que trust*, legal assets.(w)

Several authorities shew, that formerly when an executor had in his hands money, which he had raised by a sale of real estate of his testator, pursuant to a devise or power given to him for that purpose, the Courts of Law and of Equity held, that such money was in a Court of Law assets for payment of the testator’s debts.(x)

A Court of Equity has formerly held real estate, or money arising from a sale of it, to be in that Court legal assets, and, in consequence, there applicable to pay debts of different degree, according to their priority at law,—where the equity of redemption of real estate, mortgaged by a testator, was devised by him to certain persons, and their heirs, in trust to sell for payment of debts, the will also appointing the trustees executors:(y) where a man devised lands to be sold for payment of his debts,*and made the devisees executors:(z) where a man devised lands to A. and B., in trust to be sold for the payment of his debts, and made the same persons executors:(a) where a man devised a real estate to two trustees, and their heirs, to be sold for payment of debts, &c., and made those two trustees, and a third person, his executors:(b) where a person devised all his real and personal estate, whether freehold or copyhold, to be sold for payment of his debts, and appointed executors, but gave the property to be sold generally, without directing who should sell it:(c) where a person by his will charged all his estate, real and personal, with the payment of his debts, and died leaving his eldest son executor, to whom also the real estate, so charged with the debts, descended:(d) where a person devised all his estates to his brother (who was his heir at law) in fee, subject and liable to the payment of his debts, and appointed him executor.(e)

But some early authorities(f) are found to agree with the modern(g) law, that real estate is equitable assets, when, described by the words, lands and tenements, or the like general words, it is devised to persons, and their heirs, in trust to sell for the payment of debts, and the same persons are appointed executors. And also formerly(h) it was held, as it

(v) *Case of Creditors of Sir C. Cox*, 3 P. W. 342, 2d point.

(w) 29 Ch. II. c. 3, s. 10; *King v. Ballett*, 2 Vern. 248. See 2 Atk. Rep. 293.

(x) 1 Rol. Abr. 920, G. pl. 2, 3, 6, 10; *Dethicke v. Caravan*, 1 Lev. 224; *Burwell v. Corrant*, Hardr. 405; *Hawker v. Buckland*, 2 Vern. 106; *Blatch v. Wilder*, 1 Atk. 420. See also *Germey’s, or Gering’s case*, 1 Leon. 87, 2 Leon. 119; *Allexander v. Lady Gresham*, 1 Leon. 224; and *Silk v. Prime*, 1 Bro. C. C. 138, n.

(y) *Girling v. Lee*, 1 Vern. 63, and 3d ed. 65, n. (5); *Girling v. Lord Lowther*, 2 Ch. Rep. 262.

(z) *Bickham v. Freeman*, Prec. Ch. 136.

(a) *Cutterback v. Smith*, Prec. Ch. 127. See also *Challis v. Casborn*, ib. 407; *Greaves v. Powell*, 2 Vern. 248, 302; and *Anon. ib.* 405. See, likewise, 1 Atk. 420, and the

opinion of Sir T. Sewell, in *Silk v. Prime*, 1 Bro. C. C. 138, n.

(b) *Lord Maasham v. Harding*, Bunb. 339. See *Lord Massam v. Harding*, cited 2 Atk. 291.

(c) *Blatch v. Wilder*, 1 Atk. 420, 1 West Cas. T. Hardw. 322.

(d) *Freemoult v. Dedira*, 1 P. W. 429.

(e) *Young v. Dennet*, 2 Dick. 452. See also *Plunket v. Penon*, 2 Atk. 290.

(f) *Anon.* 2 Vern. 133; *Hall v. Kendall*, Mos. 328; *Prowse v. Abingdon*, 1 Atk. 482, 1 West Cas. T. Hardw. 312. See also the judgment of Sir T. Sewell, in *Silk v. Prime*, above.

(g) *Silk v. Prime*, above.

(h) *Anon.* or *Gell v. Adderly*, 2 Ch. Cas. 54; *Anon.* 2 Vern. 405; *Bickham v. Freeman*, Prec. Ch. 136. See also 1 Vern. 64, 65, and *Wolestoncroft, or Wollstencroft*, or

still is at the present time,⁽ⁱ⁾ that real estate, or money arising from the sale of it, is equitable assets, and therefore distributable among creditors of different degree, *pari passu*, where the estate is devised, in *trust to sell for the payment of debts, and the trustees [*322] are not also the executors of the will.

A Court of Equity inclines to construe assets to be equitable.^(j) And in many cases, where formerly they were, or would be, determined to be legal, they are clearly now held to be equitable assets. "I think," says Lord Camden, "the old rule is overthrown, and that wherever the land itself is devised to the same persons, who are executors, the assets will be equitable. And I hold the case to be the same, whenever the land is devised to them, or to them and their heirs, for in both cases they are equitable trustees. And I can hardly now suggest a case, where the assets would be legal, but where the executor has a naked power to sell *quod* executor."^(k) And a Court of Law now holds, "that if land be devised to trustees, to be sold for payment of debts, and the same persons are executors, the effect of that is to create a charge upon the land to the amount of the debts;" and that when sold, the proceeds in the hands of the executors are, at law as well as in equity, equitable, and not legal, assets.^(l)

Among other kinds of property by a Court of Equity held to be equitable assets, may be particularly enumerated,—Real estate by a will charged with the payment of debts:^(m) real estate by a will charged with the payment of debts, and, subject to this charge, descended to the testator's heir at law:⁽ⁿ⁾ an estate charged by will with payment of debts, and which estate descended, subject to the charge, to an infant heir:^(o) money due to a testator on a mortgage for years: the legal estate of the term being conveyed to, and vested in, trustees for him:^(p) rents and profits in the hands of devisees; in a case where lands were devised, and charged by the will with the payment of debts, *and to satisfy which a naked power to sell the lands was given to P. [*323] and M., or the survivor of them, or his heirs, P. and M. being also appointed executors:^(q) and, it appears it may be added, a lease renewed by executors in their own names.^(r)

In *Clay v. Willis*, a Court of Law held to be equitable assets, money arising from the sale of real estate mortgaged, and, under a power contained in the mortgage conveyance, sold after the death of the mortgagor; who by his will devised the equity of redemption to trustees, upon trust for payment of his debts, and appointed the trustees executors. And in the same case, it may here be mentioned, the Court decided, that the surplus produce of the sale, after satisfaction of the mortgage, having been paid to an agent for such trustees, the administrators *de bonis non*

Woolstoncroft, v. Long, 1 Ch. Cas. 32, 3 Ch. Rep. 12, 2 Freem. 175, cited in *Silk v. Prime*, above.

(i) *Silk v. Prime*, above.

(j) 3 P. W. 344; *Silk v. Prime*, 1 Bro. C. C. 138, n., 1 Dick. 387.

(k) *Silk v. Prime*, above.

(l) 1 B. & C. 372, 373; 9 B. & C. 493.

(m) *Burt v. Thomas*, cited 7 Ves. 321, 323, and 8 Ves. 30; *Bailey v. Ekins*, 7 Ves. 319.

(n) *Shiphard v. Lutwidge*, 8 Ves. 26. See also 2 P. W. 318.

(o) *Hargrave v. Tindal*, 1 Bro. C. C. 136 n., cited 7 Ves. 322.

(p) *Nugent v. Gifford*, 1 West Cas. T. Hardw. 494, 497, 1 Atk. 463.

(q) *Silk v. Prime*, 1 Bro. C. C. 138, n., 1 Dick. 384.

(r) *Ray v. Ray*, Coop. 264; See *Rawe*, or *Bromfield, v. Chichester*, Amb. 715, 2 Dick. 480.

of the testator could not maintain an action against the executor of the agent, to recover the money so deposited with the latter; that money being equitable assets, and therefore such administrators of the mortgagor not being entitled to receive it.^(s) In *Barker v. May*, a Court of Law held to be equitable assets, money arising from a sale of real estate, which a person devised to trustees, upon trust to sell; the testator directing the produce of the sale to be deemed part of his personal estate, and appointing the trustees executors. And a legatee having sued in the Ecclesiastical Court for payment of his legacy, the Court of Law granted a prohibition, on the ground that the produce of the sale of the real estate was equitable assets.^(t)

Among other instances,^(u) a Court of Equity has paid creditors of different degree, *pari passu*, or equally, in cases where the assets have consisted of,—Real Estate devised to trustees (whom the testator also made executors) to be sold for payment of his debts; and the trustees refused [*324] to act, and renounced:^(v) *real estate devised to executors, and their heirs, in trust to pay debts:^(w) real estate devised to executors, in trust for the payment of debts:^(x) lands by a will first charged with the payment of debts, and then devised, so charged, to a stranger, namely, an aunt, who was not the testator's heir at law:^(y) lands devised, and charged by the will with the payment of debts; and where to satisfy the debts, a naked power to sell the lands was given to P. and M., or the survivor of them, or his heirs, P. and M. being also appointed executors; and where the direction to P. and M. was to sell, in case the testator's personal estate should fall short in payment of all his debts, and to apply the money arising therefrom, together with the money arising from his personal estate, for the payment of all his debts:^(z) real estate devised by a will, in which the testator, after a direction for the payment of his debts, devised the rest of his estates, real and personal, after payment of his debts, and liable thereto, to trustees, upon trust to sell and dispose of the same, the money to arise from the sale thereof to be deemed part of his personal estate.^(a)

Where equitable assets have consisted of—

Lands devised in trust to sell; the devise being to O. and S. in trust to sell, and the will appointing O. and S. the only executors;

Lands devised to executors for the payment of the testator's debts;

A Court of Equity has paid out of these assets, or the money arising by a sale of them,—

Debts on bond and on simple contract, equally.^(b)

First, "Judgments that did affect the land without any such devise,"

(s) 1 B. & C. 364; 2 Dowl. & Ry. 539.

(t) 9 B. & C. 489; 4 Mann. & Ry. 386.

(u) *Earl of Kildare v. Kent*, 2 Freem. 253; *Kidney v. Coussemaker*, 1 Ves. jun. 436, 2 Ves. jun. 267, 7 Bro. P. C. ed. Toml. 573; *Pope v. Gwyn*, 8 Ves. 28 n., 2 Dick. 683.

(v) *Chambers v. Harvest*, Mos. 123.

(w) *Hall v. Kendall*, Mos. 328.

(x) *Baily v. Ploughman*, Mos. 95. See

also 2 P. W. 416, and *Challis v. Casborn*, Prec. Ch. 407.

(y) *Kent v. Craig*, cited 2 Atk. 291, 293.

(z) *Silk v. Prime*, 1 Bro. C. C. 138, n., 1 Dick. 384.

(a) *Bateson v. Lindgreen*, 2 Bro. C. C. 94, cited 7 Ves. 323.

(b) *Hickson v. Witham*, Cas. T. Finch, 195, 1 Freem. 305; *Hixon v. Wytham*, S. C., 1 C. Ch. 248.

*Real estate devised in trust to sell; the devise being to A. and B. and their heirs, in trust to sell, and thereout, in the first place, to pay the testator's debts; and the will appointing A. and B. executors;

Certain closes, which a testator willed that his executrix should sell, to pay his debts; and the intermediate rents of those closes ordered to be sold;

Estates, which a testator desired should be sold forthwith; he also directing that, after payment of several sums of money, the remainder might be vested in his executors for the payment of his debts; a devise "tantamount to giving the executor a power to sell, and to apply the money to the payment of debts;"

Lands devised to trustees for payment of debts: in a case where A., indebted to divers persons, had conveyed his lands to the use of himself for his life, and after to the use of his will; and where the trustees themselves were creditors of the testator, and bound with him as his sureties;

*An equity of redemption of lands mortgaged, in a case, where a person had mortgaged some parts of his estate thrice over, each time for near the full value, and by both deed and will conveyed and settled all his lands upon trustees for payment of his debts, and died indebted by mortgages, and by judgments, statutes, bond, and simple contract;

and then, *pari passu*, "Debts of all kinds, whether by judgments, bonds, or simple contract." (c)

Simple contract and specialty debts, *pari passu*. (d) [*325]

Creditors, whether by specialty or simple contract, *pari passu*. (e)

Creditors by specialty which bound the heir, by specialty which did not bind the heir, and by simple contract, equally. (f)

Debts, by specialty and without specialty, equally; the Court declaring "debts without specialty are to be in the same condition, and equally regarded, as debts by specialty. And the conveyance to the trustees, being themselves creditors, and sureties for A., doth not give them any preference before others." (g)

First, the real securities, and then debts by [*326] bond and simple contract; the Court ordering that "the real securities should be first satisfied, and then the debts by bond and simple contract to be paid in average; for that any other method in this case would become impracticable." (h)

(c) *Poly's case*, 2 Freem. 49, 2 Eq. Cas. Abr. 459. See *Wilson v. Fielding*, 10 Mod. 426, 2 Vern. 763, and *Wollstencroft v. Long*, 3 Ch. Rep. 12, 1 Ch. Cas. 32, 2 Freem. 175.

(d) *Lewin v. Okeley*, 2 Atk. 50, cited from *Reg. B. in Silk v. Prime*, 1 Bro. C. C. 140, 1 Dick. 397.

(e) *Barker v. Boucher*, 1 Bro. C. C. 140, n.

(f) *Newton v. Bennet*, 1 Bro. C. C. 135.

(g) *Anon.*, or *Gell v. Adderly*, 2 Ch. Cas. 54, cited in *Silk v. Prime*, 1 Bro. C. C. 138, n. See also on retainer by trustees or executors, sureties for the testator, *Silk v. Prime*, 1 Dick. 394.

(h) *Child v. Stephens*, 1 Vern. 101.

An equity of redemption of real estate, and which equity was devised to trustees, in trust to be sold for payment of debts;

Real estate mortgaged, and devised to trustees upon trust to pay debts;

An equity of redemption of real estate; and which equity a person indebted by mortgages, judgments, bonds, and simple contracts, devised to trustees for a term of years, upon trust for payment of his debts;

[*327] *Lands devised, part to be sold, and part to be mortgaged, for payment of debts;

An equity of redemption of real estate mortgaged in fee by a *cestui que trust*, who, subject to the payment of his debts, devised such equity of redemption to his son and heir at law in fee;

An equity of redemption of freehold estates mortgaged, and which estates were devised in fee, and by the will charged with the payment of debts;

An equity of redemption of land, by a testator mortgaged in fee, and devised in trust to sell to pay all his debts, the trustees being also the executors of the will;

Judgment creditors, and certain mortgagees, "according to the priority of their several securities." (i)

"First, the mortgages, then the judgments and recognizances affecting the land, and then other debts;" (j) or, according to another report of the case, "First, mortgages, judgments and recognizances that affected the land, and then other debts." (k)

Judgment creditors before creditors by simple contract; the Court saying, "A judgment creditor has a right to redeem. Where there is a mortgage, then a judgment, and then a second mortgage, the judgment creditor may redeem the first mortgage. The directions must be given upon the principle, that the judgment creditors are to be paid in the first instance." (l)

First, mortgages and judgments, and then equally, debts by bond and by simple contract. (m)

First the mortgage debts, and then debts by bond and by simple contract *pari passu*. (n)

First the mortgages, and then debts by bond and by simple contract *pari passu*. (o)

Debts by bond and by simple contract equally. (p)

(i) *Symmes v. Symonds*, 4 Bro. P. C. ed. Toml. 328; *Earl of Bristol v. Hungerford*, S. C., 2 Vern. 524. See 4 Ves. 541, 542.

(j) *Bothamly v. Lord Fairfax*, 1 P. W. 334.

(k) 2 Vern. 750.

(l) *Sharpe v. The Earl of Scarborough*, 4 es. 538.

(m) *Anon.* 3 Salk. 83.

(n) *Plunket v. Penston*, 2 Atk. 290.

(o) *Wride v. Clarke*, 1 Dick. 382.

(p) *Deg v. Deg*, 2 P. W. 412. According to the report of this case, it is said to have been there resolved, that the equity of redemption must go among all the creditors equally, "forasmuch as the debt by judgment and a debt by simple contract are in conscience equal." (Ibid. 416.) But it is observable the case does not make any other mention of a judgment debt, and the bill was brought by bond and simple contract creditors.

An equity of redemption of a term of years mortgaged by a testator possessed of it; Debts by bond and by simple contract equally.(q)

An equity of redemption of a term of years mortgaged by a testator possessed of it; In the first place, the mortgage debt, principal and interest; and then bond and other debts *pari passu*.(r)

In a case, where a Court of Equity decreed simple contract creditors to stand in the place of a mortgagee, against the mortgage land descended, a great part of the mortgage debt having *been by the executor paid out of the testator's personal estate, the Court [*328] paid out of the land the simple contract debts, and a debt by judgment, equally; such judgment having been, by a simple contract creditor of the testator, obtained after his death against his executor.(s)

In Vernon's Reports it is said, but whether by the Court, or by the reporter only, does not clearly appear, that "where creditors are plaintiffs, the usual decree is, that the debts shall be paid in course of administration; but that is to be intended of legal assets, and not of assets in equity, that are not assets at law."(t) And in Ambler it is said, but perhaps by the reporter only, "The general direction in the decree, to apply the assets in a course of administration, does not confine such application to a legal course; but it is to be taken distributively, and understood of legal or equitable, according to the nature of the assets."(u)

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*CHAPTER XXVIII.

OF MARSHALLING ASSETS.(a)

SECT. I. *Of the General Principles of Marshalling two Funds.*

II. *Of Marshalling for Creditors.*

III. *Of Marshalling for Legatees.*

IV. *Of Marshalling for a Widow, in respect of her Paraphernalia.*

*SECTION I.

[*329]

OF THE GENERAL PRINCIPLES OF MARSHALLING TWO FUNDS.

WHEN there exists two funds, and two claimants against them, and at law one of these parties may resort to either fund for satisfaction, but

(q) *Case of Creditors of Sir C. Cox*, 3 P. W. 341, cited 1 Bro. C. C. 137, 4 Ves. 542, and 1 B. & C. 372. See *Barthrop v. West*, 2 Ch. Rep. 62.

(r) *Hartwell v. Chitters*, Amb. 308, cited 1 B. & C. 372.

(s) *Wilson v. Fielding*, 10 Mod. 426, 2 Vern. 673. See, also, on judgments obtained after a testator's death, *Earl of Kildare v. Kent*, 2 Freem. 253.

(t) *Solley v. Gower*, 2 Vern. 61.

(u) *Hartwell v. Chitters*, Amb. 308.

(a) For instances of marshalling, and which may not be noticed in this Chapter, see Index, at word "Marshal," or "Assets."

the other can come upon one only, the Courts of Equity exercise the power to marshal, as it is termed, the two funds, and by this means to aid the party, whose remedy is at law confined to one of them. (b) A general principle of this interposition is, an equity, which arises from the circumstance, that without such interference, he, who has the double fund to resort to, possesses an unreasonable power to disappoint the right of him, whose remedy lies against the single fund only. (c) The way in which the Court interposes is, sometimes to turn the person, having the double security, upon that fund which is not liable to the other person's demand, and so to leave to this person the other fund open; (d) or, if satisfaction has already been taken out of this fund by him, who has the double security, then to decree the other party to stand in his place, [*330] and to draw from the *remaining fund as much as has been taken from the other. (e) And very commonly the Court suffers him, who can come against either security, to exercise his legal right of election; and then if he resorts to the only fund against which the other party can claim, this person is, as in the last mentioned instance, decreed to receive satisfaction *pro tanto* out of the other fund. (f)

When there exists two funds of assets, one of which consists of legal personal assets, and the other of equitable assets, and against these funds there are 'two claimants, namely, specialty and simple contract creditors, here, if the specialty creditors, by the exercise of their right to first payment, exhaust the assets which are legal, another description of marshalling takes place; for a Court of Equity, before it permits the specialty creditors to be paid the surplus of their debts out of the equitable assets, decrees the creditors by simple contract to draw from the latter fund, a sum equal to the money taken from the legal assets by the specialty creditors. (g) This kind of marshalling has, it seems, taken place, on the principle, that a testator intended each fund to be equally shared by both kinds of creditors; (h) or that he "intended all his creditors should be equally paid their debts;" (i) and, at other times, on the broad principle, "that by natural justice and conscience, all debts are equal, and the debtor himself is equally bound to satisfy them all." (j)

Lord Hardwicke, speaking of the rule of the Court of Chancery as to marshalling assets, and directing simple contract creditors to stand in the place of specialty creditors *pro tanto* to receive satisfaction, says that this marshalling "must be as between the real and personal assets of a person deceased; for the Court has no right to marshal the assets of a person alive; it not being subject to such a jurisdiction of equity till the death." (k) It is observable, however, that although technically the [*331] term "marshal" *is not applied except to assets, yet a species of marshalling takes place in other cases also, and

(b) Aldrich v. Cooper, 8 Ves. 382, Lord Eldon's judgment throughout.

(c) 8 Ves. 389, 394, 395, 396, 397; 9 Ves. 211; 4 Russ. 338, 340.

(d) 1 Vern. 455; 10 Mod. 462; 2 Atk. 446; 3 Atk. 273; Amb. 615; 5 Ves. 361; 8 Ves. 389, 391, 395; 1 Russ. & M. 187. See also Poye's case, 2 Freem. 51.

(e) 9 Mod. 151; 3 Atk. 369; 7 Ves. 209, 211; Cromwell v. Griffith, 1 Barnard. 207.

(f) Barn. Ch. Rep. 229; 3 Atk. 467; 1 Dick. 383.

(g) 2 P. W. 416, 417, 418; Cas. T. Talb. 220; 2 Vern. 436; Prec. Ch. 193; 3 Atk. 294; 1 Dick. 383, 384; 7 Bro. P. C. ed. Toml. 583.

(h) 2 P. W. 417, 418.

(i) 3 P. W. 323.

(j) Cas. T. Talb. 220.

(k) Lacam v. Mertins, 1 Ves. 312.

may be applied to the property of a person living.^(l) And this application seems to have been made in the following case before Lord Cowper:—"S. having several young children, and being much in debt, conveyed part of his lands, in trust for the payment of his debts; and, by another deed, conveyed other part to trustees for the maintenance of his children. This last conveyance, being voluntary, was declared void as to creditors, and still liable to their demands as before; but it was good against S. himself, and should bind him: and therefore if his creditors should fall upon those lands for a satisfaction of their debts, and thereby strip the children of their maintenance, the children should have a recompense out of the residue of the estate, which S. had reserved to himself for his own maintenance; and compared it to the case, where creditors, that have a lien upon the land, take their satisfaction out of the personal estate, which was liable to other creditors of an inferior nature, who have no lien upon the land, these creditors in equity shall stand in the place of the other creditors, who had a lien upon the land, and have a satisfaction out of that in their stead. This case is the same, for though the conveyance was voluntary in the father, yet he is bound by nature to provide for his children, and it is a sort of a debt."^(m)

SECTION II.

OF MARSHALLING ASSETS FOR CREDITORS.

Of Marshalling—1. *For Simple Contract Creditors, where Creditors by Speciality have taken the Personal Assets*;—2. *For Specialty or Simple Contract Creditors; or, as the Case may be, for both of them*.—3. *For Creditors, where the Funds to be marshalled consist of Legal and Equitable Assets.*

1. IN the case of a deceased person, who, at the time of his death, is, within the meaning of the bankrupt laws, a trader, his *real estate is made liable to satisfy his simple contract debts—by [*332] the statute 11 Geo. IV. and 1 W. IV., c. 47, s. 9, if the debtor has died since the 16th July, 1830, the time of the passing of it, and by the statute 47 Geo. III., stat 2, c. 74, if he died before that time. But except where these statutes apply, and they relate, it is seen, to certain traders only, the simple contract debts of a person deceased are governed by the common law; under which they are not payable out of his real estate, which either descends from, or is devised by him, and which he has not made by his will, or otherwise, a fund for the payment of his simple contract debts.⁽ⁿ⁾

On the death of a person, who is, or is not, a trader within the bankrupt laws, his creditors by speciality, in which his heirs are bound, are entitled to payment, by the common law, out of his freehold land descend-

(l) Aldrich v. Cooper, 8 Ves. 388, 389, 394.

(n) 4 Ves. 550; 8 Ves. 384, 389, 391, 394; 12 Ves. 154.

(m) Sneed v. Lord Culpepper, 7 Vin. Abr. 52, 2 Eq. Cas. Abr. 255, 260.

ed to his heir at law;(o) and by the statutes 3 & 4 W. & M., c. 14,(p) and 11 Geo. IV. and 1 W. IV. c. 47, s. 2, out of his freehold land of inheritance devised by him; that is, by the latter statute, if the debtor has died since the passing of it, and by the former, if he died before that time. And when the legal assets of the debtor consist of both land and personal estate, such specialty creditors are, by the common law, entitled to payment out of either of these funds: at law they may, at their election, take their remedy against the heir, or against the executor.(g)

Out of legal personal assets, specialty creditors enjoy, at law, the right to be paid before creditors by simple contract.(r) And when an executor has made this payment, he is in equity indemnified in making it, although there is not enough left to satisfy the simple contract creditors.(s) It is plain, therefore, where the assets consist of freehold land of inheritance, descended or devised, and personal assets, creditors by specialty, in which the debtor's heirs are bound, may, by the exercise of the right [*333] mentioned, *if there is a deficiency of the personal assets, either exhaust them entirely, or so much that they may not leave sufficient to pay the simple contract creditors in full. To relieve, therefore, these creditors, the Courts of Equity marshal the real and personal assets; and they may, it seems, do this, by directing the specialty creditors, who have at law both kinds of assets to resort to, to take satisfaction out of that fund, upon which the simple contract creditors have at law no claim;(t) in other words, by making the real estate pay as much of the specialty debts, as will be necessary to obtain a fund from the personal estate for payment of the simple contract creditors.(u) It has, however, been said,—“Where there is a debt by judgment or statute, which chargeth the real estate, there a Court of Equity cannot hinder the creditor's coming upon the personal estate, because he hath right so to do by law; and it is not in the testator's power to take that right away; but there the other creditors have an equity to charge the real estate, for so much as is taken out of the personal estate, and may prefer a bill for that purpose.”(v) But considerable doubt seems to be thrown on the former part of this doctrine, by a case, where “there being a debt owing to the king, it was ordered that the king's debt should be satisfied out of the real estate, that the other creditors might be let in to have satisfaction of their debts out of the personal assets.”(w) And the same doctrine appears to be directly contradicted by the opinion expressed by Lord Macclesfield, that the Court may decree “a judgment creditor who has his election at law, to resort for his satisfaction to either real or personal estate, to make such an election, as simple contract creditors may not be defrauded.”(x) Still it appears that, generally speaking, a Court of Equity does not break in upon the legal privilege of specialty creditors to come first against the personal estate, and, on the contrary, allows them to do this; and merely empowers the simple contract creditors to

(o) 2 Bl. Com. 243, 244, 340.

(p) Made perpetual by 6 and 7 Will. III. c. 14.

(g) Capel's case, 1 Anders. 7, Benl. ed. 1689, p. 96.—3 P. W. 333; 2 Atk. 426, 435; 3 Atk. 406; 2 Ves. 52; 1 Cox, 11; 8 Ves. 394.

(r) 7 B. & C. 452; 3 Salk. 83.

(s) 1 Barnard. Rep. 207.

(t) 1 Vern. 455; 10 Mod. 462; 2 Atk. 446; 3 Atk. 273; Ambl. 615; 8 Ves. 389, 391, 395. See also 3 Salk. 83.

(u) 5 Ves. 361.

(v) Colchester v. Lord Stamford, 2 Freem. 124. See Kearnan v. Fitz-Simon, 3 Ridgew. P. C. 1.

(w) Sagitary v. Hyde, 1 Vern. 455.

(x) Mills v. Eden, 10 Mod. 489.

*take, from the real estate, a sum equal to the money, which the specialty creditors have drawn from the personality.(y) [*334]

A court of Equity has marshalled assets, and decreed creditors by simple contract to stand in the place of specialty creditors, paid or to be paid out of personal estate, and to receive a satisfaction *pro tanto* out of real estate, in the instances, amongst others,(z) where the Court has decreed simple contract creditors of a testator to receive satisfaction,—out of freehold property devised:(a) out of real estate specifically devised, and not by the will charged with the testator's debts:(b) out of real estate devised to the testator's eldest son and heir at law:(c) out of money arising from the sales, directed by the Court, of an advowson in gross descended, and of freehold estates in fee, and leasehold estates *pur autre vie*, devised:(d) out of freehold estates purchased by the testator after the making of his will, and descended to his heir at law.(e)

When simple contract creditors are so decreed to stand in the place of a specialty creditor of a person deceased, the special contract binds the heirs of this person, and consequently such specialty creditor has two funds to resort to. But when in a special contract, as in a bond, the heirs are not so bound, this contract will not, at law, affect the real assets, and the specialty creditor can resort to one fund only, namely, the personal estate. In a case of this kind there is no marshalling; "as there are not two funds, and therefore no one is disappointed by the option of another."(f) The Court cannot, Lord Hardwicke says, "extend this relief to creditors further than the nature of the contract will *support it; therefore it must be a specialty creditor of the [*335] person whose assets are in question; such as might have remedy against both real and personal, or either, of the debtor deceased; it not being every specialty creditor, in whose place the simple contract creditors can come to affect the real assets, viz. where the specialty creditor himself cannot affect the assets, as where the heirs are not bound."(g)

In *Neave v. Alderton*, a person died intestate, indebted in 100*l.* by bond, in which his heirs were bound, and to the plaintiff in 45*l.*, by simple contract, and did not leave personal assets sufficient to pay his debts. The defendant was his son and heir, and had real assets, by descent, of the value of 100*l.*, and he took out administration to his father. And he having paid the debt by bond out of the real assets, the simple contract debt was decreed to be paid out of the personal assets.(h) In *Wilson v. Fielding*, an executrix, who had confessed judgment to a mortgagee, on his mortgage bond, applied part of the personal assets in paying off the mortgage. The plaintiff, W., who was a creditor by simple contract, brought an action against the executrix, who pleaded *plene administra-*

(y) 9 Mod. 151; Barn. Ch. Rep. 229, 304; 2 Atk. 436; 3 Atk. 467; 1 Ves. 312; 1 Dick. 253.

(z) *Charles v. Andrews*, 9 Mod. 151; *Vernon v. Vawdrey*, Barn. Ch. Rep. 280, 304, 2 Atk. 119. *Kinaston, or Kynaston, v. Clark*, 2 Atk. 204, 206, and stated from MS. 2 Cruise Dig. 2nd ed. 447; *Lacam v. Mertins*, 1 Ves. 312; *Cox v. Bateman*, 2 Ves. 19; *Gibbs v. Ougier*, 12 Ves. 413; *Bridgen v. Lander*, 3 Russ. 346, n. See also *Sanderson v. Wharton*, 8 Price, 680.

(a) *Snelson v. Corbet*, 3 Atk. 369.

(b) *Powell v. Robins*, 7 Ves. 209.

(c) *Scott v. Scott*, 1 Edm. 456, Amb. ed. Blunt, 383, and n. (3.)

(d) *Westfaling v. Westfaling*, 3 Atk. 460, 467.

(e) *Wride v. Clarke*, 1 Dick. 382.

(f) 8 Ves. 389; 2 Bro. C. C. 107.

(g) *Lacam v. Mertins*, 1 Ves. 312.

(h) 1 Eq. Cas. Abr. 144.

vit, and he took judgment of assets, *quando acciderint*. W., and the simple contract creditors of the testator, being decreed to stand in the place of the mortgagee, and to be paid by the testator's heir at law, to whom the mortgaged land descended, and it being made a question, whether W., by virtue of his judgment, was to be preferred to the other creditors in payment, it was adjudged, that W. being only relievable in equity, all the creditors should be paid in proportion. The compelling the heir to refund is a matter it was said, purely in equity.(i)

2. In *Gifford v. Manley*, where an instrument under hand and seal created a specialty debt, to affect the executor only, and not the heir, it was decreed that such specialty creditor "should stand in the room of such other creditors as had been satisfied out of the personal estate, in case of deficiency.(j) And in *Porey v. Marsh*, where T., a judgment creditor, had exhausted the personal estate of a testator, the Court inclined, it is said, to relieve creditors by bond. These bonds did not, it is presumed, bind the heir of the testator; and the creditors prayed to have the benefit of T.'s security, or judgment, to follow the land.(k) In *Lanoy v. The Duke of Athol*, where, under certain marriage settlements, a widow was entitled to a jointure, and a daughter to a portion, and the husband covenanted to pay the jointure, and by his will gave the residue of his estate, real and personal, (after paying his debts,) to his wife, whom he appointed sole executrix; and in which case the Court directed the settled estates to be sold, and the purchase money to be applied to pay, first the jointure, and afterwards the portion; the Court decreed, that if the money arising by the sale should not be sufficient to answer the portion, then the plaintiff (the daughter) was to stand in the place of the defendant (the jointress,) to have the benefit of the covenant for payment of the jointure, and by virtue thereof to receive satisfaction for the deficiency of her portion out of the personal estate of of her father; and if the personal estate should prove deficient, then out of the freehold and copyhold estate devised by the will for payment of debts.(l) In *Aldrich v. Cooper*, the effect of a mortgage deed was to give the mortgagee a legal estate in freehold, and an equitable estate in copyhold land, and thereby to give him recourse to two funds for the payment of his debt.(m) The mortgagor died intestate. His widow took out administration, and out of the personal estate paid to the mortgagee 767*l.*, in part of the mortgage, and of two bonds by the intestate to the mortgagee. The personal estate being exhausted, the question seems to have arisen, whether the intestate's creditors by simple contract were entitled to stand in the place of the mortgagee, in respect of what he had drawn from the personal estate, against the copyhold as well as the freehold estate. *And Lord Eldon decided, that "If it is necessary for the payment of the creditors, that the mortgagee should be compelled to take his satisfaction out of the copyhold estate; if he takes it out of the freehold, those, who are thereby disappointed, must stand in his place as to the copyhold estate.(n)

(i) 2 Vern. 763, 10 Mod. 426.

(j) *Cas. T. Talb.* 109. That a contract may be by specialty, though it does not affect real estate, as a bond not mentioning heirs, see also 1 Ves. 312, and 8 Ves. 389.

(k) 2 Vern. 182. See *Kearnan v. Fitz. Simon*, 3 Ridgew. P. C. 1.

(l) 2 Atk. ed. Sand. 444, n. (1.) *I. a Noy v. Duchess of Athol*, 8 C., 9 Mod. 5th ed. 398.

(m) 8 Ves. 392.

(n) 8 Ves. 382; which case overrules *Robinson v. Tonge*, 1 P. W. 5th ed. 680, n.

In *Gwynne v. Edwards*, a debt was secured by a mortgage of freehold land, and by a subsequent mortgage of copyholds. A suit being instituted by creditors for the administration of the mortgagor's estate, and his personalty having been exhausted, his freehold property was sold under the direction of the Court, and out of the purchase money the mortgagee was, by an order of the Court, paid his debt. And the residue of the proceeds of the sale being insufficient for the payment of the specialty creditors, Lord Gifford stated, that this case was governed by *Aldrich v. Cooper*, and decided, that the specialty creditors were entitled to have raised, by sale of the copyholds, the sum which the mortgagee received out of the freeholds.(o) In *Selby v. Selby*, a person, having contracted for the purchase of tithes, devised them by his will, and died before the sale was completed. After his death, the purchase money was paid out of his personal estate; and this estate being insufficient to pay his simple contract debts also, the Court decreed those creditors to stand, as against the devisees, in the place of the vendor, and, in respect of the lien which the vendor had on the tithes, to receive satisfaction out of this real fund.(p)

3. When assets consist of legal personal assets, and equitable assets, distributable equally among creditors by specialty and by simple contract, then, at law, the legal assets are applicable to pay the whole of the specialty debts, before the debts by simple contract.(q) And this legal right the Courts of Equity do not take from the specialty creditors.(r) If, however, the debts of these creditors, who have so taken the legal assets, are not by that fund wholly satisfied, and, to obtain payment of the surplus, *they resort to the assets which are [*338] equitable, in this case a Court of Equity interposes, and before it permits the specialty creditors to touch this fund, allows the creditors by simple contract to take from the equitable assets, a sum equal to the money, which the specialty creditors have drawn from the assets, which are legal.(s) A decree of this nature is expressed in these or the like terms: "If any of the creditors by specialty have exhausted any part of the testator's personal estate, in satisfaction of their debts, then they are not to come upon, or receive any farther satisfaction out of, the testator's real estate, until the other creditors shall thereout be made up equal to them."(t) If the share so extracted by the simple contract creditors is not sufficient to pay their debts, then the effect of this interference of equity is, to oblige the specialty creditors to bring into hotchpot the personal estate, which they have exhausted.(u)

In the case of specialty and simple contract creditors, a Court of Equity has, in the manner mentioned, marshalled legal and equitable assets, in the instances, amongst others,(v) where the assets, which were equitable, consisted—of an equity of redemption of land, and which equity was devised to trustees (who were also executors,) in trust to sell to pay

(o) 2 Russ. 289, n.

(p) 4 Russ. 336.

(q) 3 Salk. 83; 7 B. & C. 452.

(r) 2 P. W. 416; Mos. 95; Cas. T. Talb. 220; 1 Barnard. Rep. 207.

(s) Cas. T. Talb. 220; 2 Vern. 436; Prec. Ch. 193; 7 Bro. P. C. ed. Toml. 583.

(t) 2 Atk. 294.

(u) *Deg v. Deg*, 2 P. W. 416, 417, 418.

(v) *Case of Creditors of Sir C. Cox*, 3 P. W. 5th ed. 341, and 344, n. (2); *Lowhian v. Hassel*, 4 Bro. C. C. 167; *Kidney v. Cousmaker*, 7 Bro. P. C. ed. Toml. 573,

debts:(w) of real estate devised to executors, in trust for the payment of debts:(x) of lands devised to trustees to pay all the testator's debts:(y) of certain real estates, which the testator empowered his executors to sell, and whom he authorized to apply the money to the payment of debts:(z) of an equity of redemption of a mortgage in fee, made by a *cestui que trust* of a real estate; and which equity the mortgagor devised to his son and heir at law in fee, subject to the payment of his debts:(a) of real estate, which was *mortgaged, and which the owner charged [*339] by his will with the payment of his debts, and, subject thereto, devised to his wife in fee:(b) of real estate devised, and charged by the will with the payment of debts.(c)

One of the first instances, in which a Court of Equity has marshalled legal and equitable assets, is *Deg v. Deg*,(d) where Lord King affirmed a decree made by the Master of the Rolls; and where the equitable assets consisted of an equity of redemption devised in fee, in trust to sell to pay debts; and on the grounds of Lord King's decision seem to have been, the circumstances, that the testator "had connected together his real and personal estate, with a view that all should go equally to pay his debts; and he might give his equitable assets in what manner, and upon what terms, he pleased."(e) And in *Car v. The Countess of Burlington*, a case which had occurred some years before, and where the Earl of B., owing debts by bond and by simple contract, made a lease of his lands to trustees, in trust to pay all the debts, which he should owe at his death, in just proportions, not preferring one person before another; and the bond creditors had been paid good part of their debts out of the Earl's personal estate by his executors; Lord Harcourt refused to marshal the legal and equitable assets; and for the reason, it seems, that the Earl did not intend each fund to be equally shared by both kinds of creditors; his Lordship saying—"The bond creditors may still come in to be paid the remainder of their debts, in proportion with the simple contract creditors; for the law gives them the fund of the personal estate, and the party, namely, the late Earl, gives them the fund of the trust term; and the clause, that no debts shall have preference, must be intended only with regard to their satisfaction out of the trust term."(f)

The interposition of equity to marshal legal and equitable assets appears [*340] to be put by Lord Talbot, in *Haslewood v. Pope*, *on the principle, that by the devise of lands to trustees, in trust to pay all the testator's debts, the testator "intended all his creditors should be equally paid their debts."(g) And, on another occasion, the same learned judge places the interference of equity in these cases on the broad principle, "that by natural justice and conscience all debts are equal, and the debtor himself is equally bound to satisfy them all."(h)

The doctrine of marshalling the legal and equitable assets of a testator extends to postpone a specialty creditor, although he is also executor of

(w) *Deg v. Deg*, 2 P. W. 412, cited Mos. 95, 124, 329.

(x) *Baily v. Ploughman*, Mos. 95.

(y) *Haslewood v. Pope*, 3 P. W. 323.

(z) *Newton v. Bennet*, 1 Bro. C. C. 135.

(a) *Plunket v. Penson*, 2 Atk. 290.

(b) *Wride v. Clarke*, 1 Dick. 382.

(c) *Bradford v. Foley*, 3 Bro. C. C. 351, n.

(d) 2 P. W. 412, 416.

(e) 2 P. W. 417, 418. See also 1 P. W. 228, 229.

(f) 1 P. W. 228; cited 2 Atk. 110, Barn. Ch. Rep. 229, and 2 Ves. 364.

(g) 3 P. W. 323.

(h) *Morrice v. Bank of England*, Cas. T. Talb. 220.

the will, and the equitable assets consist of real estate devised to the executor, in trust for the payment of debts. As executor, he may retain the personal estate against all creditors of equal degree; but if, to pay the surplus of his debt, he comes upon the real estate, he must give way to the other creditors, until they have received enough to make them equal with himself.⁽ⁱ⁾

A case is thus reported—"Decreed by Somers, Lord Chancellor, that where a real estate is, upon an equitable title, made subject by this Court to the payment of debts, and it appears that there is a sufficient legal estate, *i. e.* goods and chattels, to satisfy debts upon specialties, for which the creditors may have remedy at law against the executor; in such case, the debts upon simple contract, for which there is no remedy at law, shall be first satisfied out of the equitable estate."^(j)

SECTION III.

OF MARSHALLING ASSETS FOR LEGATEES.

1. *When Legacies are bequeathed out of Personalty only, and Real Estate is beneficially devised, or descends.*—2. *When bequeathed out of Personalty only, and a Debt secured by Mortgage of Real Estate is paid out of the Personal Assets.*—3. *When bequeathed out *of Personalty only, and the purchase-money of Real Estate, bought by the Testator, is paid out of his* [*341] *Personal Assets.*—4. *When bequeathed out of Personalty only, and the Will devises Real Estate in trust for, or charges Real Estate with, the payment of Debts, including Debts by Simple Contract.*—5. *When some are bequeathed out of Personalty only, and others are charged on, as an auxiliary fund, Real Estate.*—6. *When, by the Death of the Legatee before the Time of payment, the Legacy is sunk into Real Estate, charged, as an auxiliary fund, with the payment of it.*—7. *When a Legacy bequeathed to charitable uses is void under the Statute 9 George II. c. 36.*

1. **WHEN** a will contains a beneficial devise of freehold land, and bequeaths general legacies, and the testator dies indebted by bond or covenant, in which his heirs are bound, and the creditor by bond or covenant is paid out of the testator's personal assets, which assets are, after this payment, not sufficient to pay the legacies bequeathed, a Court of Equity will not marshal the assets, and pay the legacies out of the land devised.^(k) Nor, it appears, will it so pay to them, although the land is devised by a residuary devise of the rest and residue of the testator's real estate.^(l) But although in these cases equity will not, against a devisee,

(i) *Baily v. Ploughman*, Mos. 95.

(j) *Feverstone v. Scetle*, 3 Salk. 83.

(k) *Horne v. Meyrick*, 1 P. W. 201, 203, 2 Salk. 416, cited Cas. T. Talb. 54; *Clifton v. Burt*, 1 P. W. 678; *Haslewood v. Pope*, 3 P. W. 322, 324, *Hanby v. Roberts*, Amb.

127, 1 Dick. 104; *Forrester v. Lord Leigh*, Amb. 171; *Scott v. Scott*, 1 Eden, 458, Amb. 283; *Aldrich v. Cooper*, 8 Ves. 397.

(l) *Keeling v. Brown*, 5 Ves. 359. Yet see 1 Dick. 105, and Amb. 129.

marshal the assets, yet if freehold land descends to the testator's heir at law, such heir is not so favoured, and against him the Court will marshal the assets, and to the amount of the personal estate, which, to pay the bond or covenant debts, is taken from the legatees, will satisfy them out of the land descended. (m) This difference between a devise and descent necessarily raises an important question, when the devise is to the testator's heir at law. A material inquiry then is, whether *the [*342] heir takes by descent or purchase; for if the former, the legatees are, and if the latter, are not, entitled to stand in the place of the specialty creditors, and come upon the real estate devised. (n)

On the payment of legacies, when there are both simple contract creditors and legatees, to stand in the place of creditors by specialty, it was held in *Fenhoulhet v. Passavant*—"If specialty creditors exhaust the personal estate, the simple contract creditors are to receive a satisfaction *pro tanto* out of the real assets descended. And if the debts of the simple contract creditors shall not amount to the whole of the personal estate, which the specialty creditors shall so exhaust, the legatees are to stand in the place of such specialty creditors, for the residue of what they shall exhaust out of the personal estate, and are to be paid *pari passu*." (o)

2. An important distinction is to be noticed between a bond debt and a debt secured by mortgage. For if lands of inheritance are mortgaged, and the personal assets of the mortgagor are not sufficient to pay both the mortgage debt, and also legacies bequeathed by him, and the mortgage is paid off out of the personal estate, then the assets will be marshalled, and the legatees empowered to receive their legacies out of the mortgaged estate, not only when this estate has descended to the mortgagor's heir at law, (p) but even when it is beneficially devised by the will. (q) The ground of this distinction, between a bond and mortgage debt, is, that a bond is not a lien on real estate, even in the testator's hands; but a mortgage is a lien on it in the hands of the testator, and of either his heir at law or devisee. (r)

3. The general principle of marshalling assets being, that when two parties have claims to be paid out of assets, and for payment one party [*343] can resort to two funds, as real and personal *estate, and the other party but to one fund, as the personal estate only, the former party is not permitted, by the exercise of his choice over the funds, to disappoint the payment of the latter, (s) this principle seems to apply to the case of a vendor of real estate, and a legatee, when the vendor has, for his purchase money, a lien on the estate sold to the testator, by whom the legacy is bequeathed; and the inclination of late authori-

(m) *Herne v. Meyrick*, 1 P. W. 201, 202; *Tipping v. Tipping*, ib. 729; *Hanby v. Roberts*, Amb. 127, 1 Dick. 104; *Forrester v. Lord Leigh*, Amb. 171, 174; *Scott v. Scott*, 1 Eden, 458, Amb. 383; *Fenhoulhet v. Passavant*, 1 Dick. 253. See also *Bowman v. Reeve*, Prec. Ch. 577, and *Lucy v. Gardener*, Bunb. 137.

(n) *Herne v. Meyrick*, 1 P. W. 201; *Scott v. Scott*, 1 Eden, 458.

(o) 1 Dick. 253.

(p) *Anon.*, 2 Ch. Cas. 4. See also *Cas.*

T. Talb. 54; *Tipping v. Tipping*, 1 P. W. 730; and *Robinson v. Gee*, 1 Ves. 252.

(q) *Lutkins v. Leigh*, Cas. T. Talb. 53; *Forrester v. Lord Leigh*, Amb. 171, 174; *Norris v. Norris*, 2 Dick. 542; *Norman v. Morrell*, 4 Ves. 769; *Aldrich v. Cooper*, 8 Ves. 397.

(r) *Cas. T. Talb. 54*; Amb. 174.

(s) *Aldrich v. Cooper*, 8 Ves. 388, 396, 397; *Trimmer v. Bayne*, 9 Ves. 211; *Lucy v. Gardener*, Bunb. 137.

ties may perhaps be stated to be, that if a vendor, entitled to be paid out of the real estate sold, and also out of the purchaser's personal assets, takes to the latter fund for payment, and a legacy given by the purchaser is bequeathed out of his personal estate only, a Court of Equity will, if necessary, marshal the assets, and pay the legatee out of the purchased estate, in the hands of the heir at law, if not of a devisee, of the purchaser.^(t) Yet against the application of the general principle to this case of a vendor and legatee, there is, it is not to be forgotten, a decision by Lord King, in *Coppin v. Coppin*,^(u) and the opinion of Lord Hardwicke, in *Pollexfen v. Moore*.^(v)

4. When a person devises real estate, in trust for the payment of debts, including debts by simple contract, and, by the will, or a codicil,^(w) bequeaths legacies, specific or general, and the personal assets are so far exhausted by the payment of either specialty or simple contract debts, as to break in upon the legacies, the legatees are allowed to stand in the place of the specialty or simple contract creditors, and, to the amount of the personalty exhausted by the debts, to receive their legacies out of the estate devised for the payment of debts.^(x) And the legatees are entitled to be so paid, when the real estate is not devised in trust to pay the debts, but is beneficially devised, and is only charged with the payment of them.^(y)

*It has been said by Lord Hardwicke, that, when a person [*344] bequeaths a legacy, and by his will charges his debts on his real and personal estate, the rule is that the debts shall be paid out of the real estate, and the legatee shall come on the personal; and that a Court of Equity will marshal the assets, not by way of standing in the place of creditors, but by turning the debts on the real estate. And his Lordship adds, that there is no rule that, where real and personal estates are charged with the payment of debts, and the *residue* of the personalty is given to a legatee or children, the Court will in such case turn the charge on the real, to give the whole personal estate to the legatee.^(z)

5. When, of legacies bequeathed by a will, or will and codicil, some are charged on, as an auxiliary fund, real estate, and others are not charged on it, and the personal assets are not sufficient to pay all the legacies, a Court of Equity will marshal the assets; and if the legacies charged on the real estate are paid out of the personalty, will, to the amount of the sum so taken out of the personal estate, pay out of the real estate the legacies not charged on it.^(a) In several cases of this kind, the legatees, whose legacies were not charged on the real estate, have been held entitled to be, before the other legatees, paid out of the personal estate, and to oblige the legatees, whose legacies were charged on the real estate, to resort to this estate for payment.^(b)

(t) *Austen v. Halsey*, 6 Ves. 475; *Trimmer v. Bayne*, 9 Ves. 211, 4 Russ. 339, n.; *Mackreth v. Symmons*, 15 Ves. 338, 344, 345; *Headley v. Readhead*, Coop. 50; *Selby v. Selby*, 4 Russ. 336. See Sugd. Vend. & P. 6th ed. 531—537, and Coote on Mortg. 254—259.

(u) Sel. Ca. Ch. 55, 2 P. W. 291, cited 4 Russ. 338.

(v) 3 Atk. 272, cited 4 Russ. 338.

(w) *Norman v. Morrell*, 4 Ves. 769.

(x) *Haslewood v. Pope*, 3 P. W. 323.

(y) *Hanby v. Roberts*, Amb. 129, 1 Dick. 106; *Foster v. Cook*, 3 Bro. C. C. 347; *Bradford v. Foley*, and *Webster v. Alsop*, ib. 351, n.; *Norman v. Morrell*, 4 Ves. 769; *Aldrich v. Cooper*, 8 Ves. 397.

(z) *Arnold v. Chapman*, 1 Ves. 110.

(a) *Hanby v. Roberts*, Amb. 127; *Hamly v. Fisher*, S. C., 1 Dick. 104; *Bligh v. Earl of Darnley*, 2 P. W. 619. See also *Ironmonger v. Lassells*, 1 West Cas. T. Hardw. 143.

(b) *Hyde v. Hyde*, 3 Ch. Rep. 155, 160;

In *Reynish v. Martin*, a person devised all her real estate, subject to such charges as should be in her will after expressed. On a condition *precedent* of marriage with consent, she bequeathed a legacy to A., which legacy was not limited over on breach of the condition; and the [*345] testatrix charged all her real estate with all her *debts and legacies. A. married without the consent required; and Lord Hardwicke (and, it seems, the Master of the Rolls also) was of opinion, that the legacy, depending on a condition *precedent*, *never vested*, so far as respects the *real* estate; but the lands not being originally charged, but only liable to be so on performance of the condition, that this case must be considered as a mere personal legacy. And as the testatrix's personal estate might be exhausted by the payment of debts and other legacies, the next question, his Lordship said, was, whether the Court could not marshal the assets in such a manner, as to give the legatee a remedy out of the real estate. And as the real estate was expressly charged with the payment of all debts and legacies, and, by the event which had happened, the legacy to A. fell out to be a charge on the personality only, Lord Hardwicke held, that the legatee ought to stand in the place of such creditors or legatees, as had received a satisfaction out of the personal assets; and he said that to order it so was the constant rule and practice of the Court. His Lordship directed, that in case the personal estate should be exhausted by the payment of debts, or other legacies, the plaintiff (who was the husband and personal representative of the legatee) should stand in the place of such creditors and legatees, and receive a satisfaction *pro tanto* out of the real estate.(c)

6. When real estate is, as a fund auxiliary to the personal assets, devised in trust for, or charged with, the payment of debts and legacies, or legacies only, and a legacy is bequeathed to A., to be paid at the age of twenty-one, and A. dies before that time, and by which death the legacy becomes not payable out of the real estate; and there are not personal assets sufficient to pay all the debts and legacies, or, as the case may be, legacies only; then it appears a Court of Equity will not construe the legacy to be charged on the personal estate only, and will accordingly not marshal the assets, and first pay A.'s legacy out of the personal estate, and by this means cause it to pass to A.'s personal representative.(d) [*346] *From these cases, *Reynish v. Martin*, which has just been noticed, seems to be distinguishable by the circumstance, that, in the latter case, the legacy was, by reason of the failure of the condition *precedent* annexed to it, construed to be a charge, not on real estate, but on the testator's personality only.

7. In this place is to be considered the subject of marshalling assets in favour of a bequest to charitable uses: 1. By paying debts or legacies out of real estate; and 2. By paying them out of leaseholds for years, or mortgage-money, or certain other kinds of property.

1. The statute 9 Geo. II., c. 36, enacts,

“That no manors, lands, tenements, rents, advowsons, or other here-

Colchester v. Lord Stamford, 2 Freem. 124; *Grise v. Goodwin*, ib. 264; *Masters v. Masters*, 1 P. W. 421; *Bligh v. Earl of Darnley*, 2 P. W. 619; *Norman v. Morrell*, 4 Ves. 769; *Bonner v. Bonner*, 13 Ves. 379. See *Foy v. Foy*, 1 Cox, 163.

(c) 8 Atk. 330, 1 Wils. 130, cited 3 Ves. 138.

(d) *Prowse v. Abingdon*, 1 Atk. 482, 484, 486, 1 West Cas. T. Hardw. 312, 316; *Ord v. Ord*, 2 Dick. 439; *Pearce v. Loman*, or *Taylor*, 3 Ves. 135.

ditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds) be and be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, (including the days of the execution and death,) and be enrolled in his Majesty's High Court of Chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books, usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and *death;) and unless the same be made to take effect in possession for the charitable use intended, immediately [*347] from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

“That all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting, or to affect, any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge, or incumbrance affecting, or to affect, the same, to or in trust for any charitable uses whatsoever, which shall at any time from and after the 24th June, 1736, be made in any other manner or form, than by this Act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void.”

A legacy, which a person bequeaths to charitable uses, and makes payable out of his personal estate, is valid. (e) But a legacy given to charitable uses is, by the above statute, void, if made payable out of real estate only, freehold or copyhold; (f) as if it is charged on real estate, (g) or is charged on it by a will, which bequeaths the legacy to the executors, and the residue of the personal estate to the charity, (h) or is given out of the produce of a sale, which the testator directs to be made of real estate. (i) And when a legacy to charitable uses is bequeathed out of personalty, and out of, as an auxiliary fund, real estate, or the produce of real estate

(e) *Sorresby, or Soresby, v. Hollins*, 9 Mod. 5th ed. 221, 2 Burn E. L. 7th ed. 556, and stated Amb. 211.

(f) *Arnold v. Chapman*, 1 Ves. 108, cited 3 Barn. & Ald. 150. See also 1 Ves. 225.

(g) 1 Ves. 110; Amb. 24, 25.

(h) *Arnold v. Chapman*, 1 Ves. 108, cited 17 Ves. 466.

(i) *Foster v. Blagden*, Amb. 704; *Hill-yard v. Taylor*, ib. 713.

directed to be sold, this legacy is void, so far as it is given out of the realty.(j)

[*348] *A bequest of a residue of personal estate to charitable uses is valid.(k) But if a residue is made to consist of personalty, and also of the produce of real estate directed to be sold, the bequest is void, so far as it affects this produce.(l) Where a *residue* of personal estate has been bequeathed to charitable uses, a Court of Equity has refused to marshal real and personal estate, and, by throwing debts, or debts and legacies, on the real fund, to leave the personalty clear for the charity, in instances where the real fund was real estate descended to the testator's heir at law, and charged by the will with debts, or debts and legacies; or real estate devised in trust for, or charged with, the payment of debts and legacies; as,—in *Arnold v. Chapman*, where a testator devised, “after payment of debts and legacies, the residue and remainder of all his estate, freehold, copyhold, leasehold, plate, rings, stock, &c., to the Governors of the Foundling Hospital, and their successors for ever:”(m) in *Mogg v. Hodges*, where a testatrix “gave all her real estate in W. and M. to her executors, in trust, at the end of five years after her decease, to sell the same, and to apply the money arising from such sale, and the rents in the meantime, to the uses in the will mentioned; and subjected her personal estate to the payment of her debts and legacies; and, after some pecuniary legacies, declared her will, that all the residue of her personal estate, and of that money that should be raised by sale of her real, should be disposed of to such charitable uses as her executors should think fit, desiring them to have regard to the Infirmary at Bath, for the disposition of some part thereof:”(n) in *Foster v. Blagden*, where a testatrix devised her real and personal estate, after payment of her debts, to the plaintiffs, in trust to dispose thereof, and directed of this trust money 500*l.* to be paid to the Corporation of the Sons of the Clergy, [*349] and the residue to Christ's Hospital.(o) And on the *authority of *Foster v. Blagden*, Lord Bathurst, in *Hillyard v. Taylor*, reversed a decree made in this cause by Sir T. Clarke.(p)

But formerly, it appears, a distinction was made between a *residue* and a *legacy*. For when a person bequeathed a legacy out of personal estate to charitable uses, and bequeathed other legacies out of his personal estate, and, in aid of the personalty, devised real estate in trust for, or charged with, the payment of debts and legacies; in this case, there being two funds applicable to pay the debts and legacies, a Court of Equity did marshal the assets in favour of the charity, by throwing the other legacies,(q) or, as the case might be, both debts and legacies,(r) on the real estate. On more than one occasion Lord Hardwicke stated, and in this doctrine Lord Northington, it should seem, concurred,(s) that “when there are general legacies, and the testator has charged his real estate with the payment of all his legacies, if the personal estate is not

(j) *Attorney General v. Lord Weymouth*, Amb. 20, cited 1 Cox, 12; *Currie v. Pye*, 17 Ves. 462.

(k) *Mogg v. Hodges*, 1 Cox, 12, 13, 2 Ves. 52; *Grimmett v. Grimmett*, Amb. 210, 2 Dick. 251.

(l) *Mogg v. Hodges*, 1 Cox, 9, 2 Ves. 52; *Attorney General v. Lord Weymouth*, Amb. 20, 24, 25; *Foster v. Blagden*, Amb. 704.

(m) 1 Ves. 108.

(n) 1 Cox, 9, 2 Ves. 52.

(o) Amb. 704, and ed. Blunt, n. (2).

(p) Amb. 713; *Hilliard v. Taylor*, S. C., 2 Dick. 475.

(q) Amb. 158, 217; 2 Eden, 211.

(r) Amb. 25.

(s) 2 Eden, 211.

sufficient to pay the whole, the Court has said the legacy to the charity, should be paid out of the personal estate, and the rest out of the real estate, that the will of the testator may be performed *in toto*.”(t) And, accordingly, Lord Hardwicke, by a decision, turned both debts and legacies on the real estate.(u) And a like decision Lord Northington made in a case, where he “decreed the charity legacies to stand in the place of the specialty creditors, for what they should exhaust of the personal estate.”(v) These authorities are, however, contradicted, and must, it appears, be considered to be overruled by some later decisions, in which this doctrine of marshalling assets, by paying debts or legacies out of real estate, is said to be wholly exploded, as an evasion of the statute.(w)

2. A bequest to charitable uses is void under the statute, if it is of a leasehold for years,(x) bequeathed either specifically,(y) *or [*350] by a residuary clause, which bequeaths it either by name,(z) or under a general description of the testator’s personal estate.(a) A bequest to charitable uses is also void, when made by a mortgagee of the mortgage money,(b) his estate being in fee,(c) or for years.(d) And a bequest to charitable uses is likewise void, when made of several other kinds of property;(e) and has been held to be void in the instances of bonds of the commissioners of a turnpike,(f) of money secured by a mortgage of turnpike tolls,(g) and of money lent on the security of poor rates and county rates.(h)

In *Attorney General v. Graves*, where a residue of personal estate was bequeathed to a charity, and in the residue a leasehold for years was by name included, Lord Hardwicke decreed, that this leasehold was to be considered as part of the personal estate undisposed of, and that the same was, in the first place, applicable to the payment of the testator’s debts and funeral expenses, and that the residue of such leasehold belonged to the testator’s next of kin.(i) Also, in *Attorney General v. Tomkins*, where a residue of personal estate was bequeathed to a charity, and under the general description of personal estate was included a leasehold for years, Lord Hardwicke made the like decision; observing, that the leasehold shall be “first applied to payment of the debts and legacies, as a real estate descending would be before that part that is devised;” and

(t) Amb. 158, 217.

(u) *Attorney General, or James, v. Lord Weymouth*, Amb. 20, 25, cited 1 Cox, 12, and 2 Ves. 52.

(v) *Attorney General v. Lord Mountmorris*, 1 Dick. 379.

(w) *Foy v. Foy*, 1 Cox, 163; *Ridges v. Morrison*, ib. 180; *Makeham v. Hooper*, 4 Bro. C. C. 153.

(x) *Attorney General v. Tyndall*, 2 Eden, 307, Amb. 614; *Shanley v. Baker*, 4 Ves. 732; *Paice v. Archbishop of Canterbury*, 14 Ves. 368; *Currie v. Pye*, 17 Ves. 462; *Johnston v. Swann*, 3 Madd. 457.

(y) *Negus v. Coulter*, Amb. ed. Blunt, 367, & 368, n. (2); 1 Dick. 326.

(z) *Attorney General v. Graves*, Amb. ed. Blunt, 155, and 158, n. (3)

(a) *Attorney General v. Tomkins*, Amb. 216, 2 Kenyon, pt. 2, p. 129.

(b) *Attorney General v. Martin*, stated 3 Bro. C. C. 377; *Pickering v. Lord Stamford*, 2 Ves. jun. 272, 581, 4 Bro. C. C. 214; *White v. Evans*, 4 Ves. 21; *Howse v. Chapman*, ibid. 542; *Paice v. Archbishop of Canterbury*, 14 Ves. 368; *Currie v. Pye*, 17 Ves. 462; *Johnston v. Swann*, 3 Madd. 457.

(c) *Attorney General v. Meyrick*, 2 Ves. 44.

(d) *Attorney General v. Caldwell*, Amb. 635.

(e) *Howse v. Chapman*, 4 Ves. 542.

(f) *Howse v. Chapman*, 4 Ves. 542.

(g) *Knapp v. Williams*, 4 Ves. 430. See also 10 Ves. 44.

(h) *Finch v. Squire*, 10 Ves. 41.

(i) Amb. ed. Blunt, 155, and 158, n. (3.)

decreeing that the leasehold ought to be considered as personal estate undisposed of, *and to be first applied towards payment of the [*351] testator's debts, funeral expenses, and pecuniary legacies.(j) A like decision was made by Sir Thomas Clarke, in *Negus v. Coulter*;(k) and, where a testatrix bequeathed all her leasehold estates to charitable uses, and gave the residue of her estate to the same uses, "to such uses, intents, and purposes, as aforesaid," by Sir Thomas Clarke, in *Attorney General v. Tyndall*;(l) and, where a mortgage passed by a residuary bequest in the will of the mortgagee, by Sir Thomas Sewell, in *Attorney General v. Caldwell*;(m) and *Attorney General v. Martin*.(n)

This doctrine, however, of marshalling assets, in the case of leasehold, for years, or mortgage money, bequeathed to a charity, appears to be overruled by several later decisions. It was, perhaps, first shaken by Lord Northington's opinion, expressed in *Attorney General v. Tyndall*, where his Lordship reversed the decree of Sir Thomas Clarke; although there, it is observable, the reversal did not take place on the point of marshalling only; for Lord Northington decided, not only that the specific bequest of the leasehold for years was void, but that the bequest of the residue was itself likewise void;(o) and consequently there was, under these circumstances, no room left for marshalling. Lord Hardwicke's principles of marshalling, in the case of leaseholds for years, or mortgage money, bequeathed to a charity, seem to have been, that the property was undisposed of, and belonged to the testator's next of kin; and, as assets applicable to the payment of debts and legacies, resembled land descended to a testator's heir at law, and which land Lord Hardwicke took, in *Galton v. Hancock*;(p) to pay a debt secured by mortgage of lands devised.(q) It may be doubted if these principles occurred to Lord Northington, in *Attorney General v. Tyndal*, where his Lordship said [*352] he did not understand the marshalling of one *fund.(r) It is clear that Lord Hardwicke saw two funds; namely, the property undisposed of, and the residue.(s)

Sir T. Sewell's decree in *Attorney General v. Martin* was, it appears, reversed by Lord Thurlow.(t) And the Court has refused to marshal assets in *Waller v. Childs*, where a person devised all his real and personal estate to trustees, upon trust to sell and pay debts and legacies, and to place out the surplus money at interest, and disposed of this surplus to charitable uses; in which case part of the personal estate consisted of leaseholds for years;(u) and in *Attorney General v. Hurst, or Earl of Winchelsea*, where a residue of personal estate was bequeathed to charitable uses, and part of such residue consisted of mortgages.(v) In *Attorney General v. Earl of Winchelsea*, Sir R. P. Arden, by whom the decision was made, "conceived this case to stand upon the same ground, as if the testator had specifically bequeathed his mortgage to one person,

(j) Amb. ed. Blunt, 216, and 218, n. (5), cited 1 Dick. 327.

(k) 1 Dick. 326, Amb. ed. Blunt, 367, and 368, n. (2.)

(l) 2 Eden, 207, Amb. 614.

(m) Amb. ed. Blunt, 635, and 636, n. (5.)

(n) Stated 3 Bro. C. C. 377.

(o) 2 Eden, 207, Amb. 614.

(p) 2 Atk. 430.

(q) Amb. 217, 218.

(r) 2 Eden, 311.

(s) Amb. 217, 218. See also the decree in *Attorney General v. Graves*, Amb. ed.

Blunt, 157, n. (3.)

(t) 3 Bro. C. C. 378.

(u) Amb. 524.

(v) 2 Cox, 364, 3 Bro. C. C. 378.

and the other part of his personal estate to another. In such a case they should contribute to the payment of the debts and legacies, rateably according to the amount of what they took. The next of kin, in this case, he considered as if he had been a legatee of the mortgages; and therefore decreed that the payment of the debts and legacies should be made out of the mortgages, and out of the rest of the personal estate, rateably according to the amount of each of them respectively."^(w) It was in form declared, that the debts, legacies, and costs of suit, ought to be paid out of the testator's general personal estate, and out of the monies secured upon mortgage, or other real securities, *pro rata*; that the surplus of the personal estate, exclusive of such part thereof as shall appear to have been secured by mortgage (after bearing the proportion of the testator's debts, &c.,) be applied for the several charitable purposes mentioned in the will; and that one moiety of so much of the personal estate as shall have arisen from mortgages, or any other real securities, (after payment of debts,) doth belong to R. D.; one of the next of [*359] kin, and the other moiety to E. C., as the representative of the other next of kin.^(x) This apportionment of the charges between the different funds has been followed in other decisions.^(y)

The conclusion that must be drawn from the modern authorities on marshalling assets for a charity, either by paying debts or legacies out of real estate, or by paying them out of leaseholds for years, or mortgage money, or certain other kinds of property, appears to be, that a Court of Equity, in general cases, certainly will not, and probably in no case will, marshal assets in favour of either a residue or legacy bequeathed to charitable uses.^(z) Sir Lloyd Kenyon, in *Ridges v. Morrison*, said, that "whatever difference of opinion there might have formerly been upon the subject, he considered it to have been the established law of the Court, from Lord Northington's time, not to marshal or arrange assets in favour of a charity."^(a) And in *Makeham v. Hooper*, it was, to the like effect, said by Lord Commissioner Ashhurst, that "he thought they were bound by the recent cases, with respect to the question of marshalling; that it did not appear what was the reason of the turn in the cases, but as the decisions had taken that course, they could not alter them."^(b)

SECTION IV.

OF MARSHALLING ASSETS FOR A WIDOW, IN RESPECT OF HER PARAPHERNALIA.

AFTER the death of a husband, his creditors cannot take, in satisfaction of their debts, his widow's necessary apparel.^(c) But, with this

(w) 3 Bro. C. C. ed. Belt, 380, n. (3.) (x) Middleton v. Spicer, 1 Bro. C. C. 201; Ridges v. Morrison, 1 Cox, 180.
(x) 3 Bro. C. C. ed. Belt, 380, 381, 2 Cox, 366. (a) 1 Cox, 181.
(y) Howse v. Chapman, 4 Ves. 542; (b) 4 Bro. C. C. 156.
Paice v. Archbishop of Canterbury, 14 Ves. 364, 372; Curtis v. Hutton, ib. 537. (c) Noy's Max. ch. 49; 2 Bl. Com. 436; 2 Ves. 7.

[*354] exception, a widow's paraphernalia are, as before *it has been seen, *(d)* subject to the payment of her husband's debts, *(e)* as by recognizance, *(f)* specialty, *(g)* or simple contract. *(h)* Yet, to preserve paraphernalia for a widow, and to empower her to retain them, or, if they have already been taken by her husband's creditors, to compensate the widow for the loss of them, a Court of Equity will marshal the husband's assets. *(i)* Where they had not been taken by the creditors, a Court of Equity has preserved for the widow her paraphernalia, by turning a creditor by covenant on real assets descended to the husband's heir at law; *(j)* and a creditor by recognizance on real estate devised by the husband; *(k)* and, in other instances, by turning creditors on the real estate, where the husband by his will subjected his real and personal estate to the payment of his debts, *(l)* and, in another case, where he by his will empowered his wife (whom he made executrix) to raise, by mortgage of a particular real estate, a sufficient sum of money for payment of his debts, in aid of his personal estate, and bequeathed to his wife the use of her jewels for her life. *(m)*

When creditors have already taken paraphernalia in satisfaction of their debts, a Court of Equity will compensate the widow for this loss, in instances where the personal estate has been exhausted by specialty creditors, by decreeing her to stand in their place, and, to the value of the paraphernalia taken, *(n)* to receive satisfaction out of the real estate descended to the husband's heir at law, *(o)* and perhaps, also, but this point

[*335] is not *free from doubt, out of real estate devised by the husband, and which he has not by the will devised in trust for, or charged with, the payment of his debts. *(p)* And in instances where the personal estate has been exhausted by either specialty or simple contract creditors, the Court will decree the widow to stand in their place, and to receive satisfaction for her paraphernalia out of real estate, devised by the husband in trust for the payment of his debts, *(q)* or by his will charged with the payment of them. *(r)*

(d) Chapter X.

(e) Viscountess Bindon's case, Mo. 213, 216; Stubbs v. Stubbs, Cas. T. Finch, 415; Wilson v. Pack, Prec. Ch. 295; Burton v. Pierpoint, 2 P. W. 78; Nicholas v. Southwell, Mos. 177; Ridout v. Earl of Plymouth, 2 Atk. 104; Lord Townshend v. Windham, 2 Ves. 1, 7.

(f) Tynt v. Tynt, 2 P. W. 542.

(g) Tipping v. Tipping, 1 P. W. 729; Snelson v. Corbet, 3 Atk. 369.

(h) Willson v. Pack, Prec. Ch. 295; Snelson v. Corbet, 3 Atk. 369.

(i) Northey v. Northey, 2 Atk. 78, 79; Aldrich v. Cooper, 8 Ves. 397.

(j) Tipping v. Tipping, 1 P. W. 729.

(k) Tynt v. Tynt, 2 P. W. 542.

(l) Bingham v. Erneley, 2 Eq. Cas. Abr. 260, in marg.

(m) Boynton v. Parkhurst, 1 Bro. C. C.

576; Boynton v. Boynton, S. C., 1 Cox, 106. See Parker v. Harvey, 11 Vin. Abr. 181, 2 Eq. Cas. Abr. 627, 4 Bro. P. C. ed. Toml. 604.

(n) 2 Atk. 79; 3 Atk. 438.

(o) Probert v. Clifford, 1 West Cas. T. Hardw. 638, 2 P. W. 5th ed. 544, n., Amb. 6; Probert v. Morgan and Clifford, S. C., 1 Atk. 440; Snelson v. Corbet, 3 Atk. 369. On a widow's title to satisfaction for paraphernalia out of assets fallen in after the paraphernalia have been applied to pay debts, see Burton v. Pierpoint, 2 W. 78.

(p) Tynt v. Tynt, 2 P. W. 542; Probert v. Clifford, above; Ridout v. Earl of Plymouth, 2 Atk. 104; Aldrich v. Cooper, 8 Ves. 397.

(q) Inledon v. Northcote, 3 Atk. 430, 438.

(r) 3 Atk. 438.

*CHAPTER XXIX.

[*356]

OF EXONERATION OF REAL ESTATE.

SECT. I. *Of Exoneration of Land Mortgaged.*

- II. *Of Exoneration of Land charged; where the Principle, on which mortgaged Land is exonerated, as inapplicable.*
- III. *Of Exoneration of Land devised, charged with Debts or Legacies; where the Devisee gives a Bond, or Promissory Note, to pay a Debt or Legacy charged.*
- IV. *Of Exoneration of Land descended; where a Bond Debt is paid by the Heir.*

SECTION I.

OF EXONERATION OF LAND MORTGAGED.

- 1. *Of Exoneration out of the Assets of the original Mortgagor.—*
- 2. *Of Exoneration out of the Assets of the Heir at Law, or Devisee, of the original Mortgagor.—*
- 3. *Of Exoneration out of the Assets of a Purchaser of the mortgaged Land.—*
- 4. *Of Exoneration out of the Assets of one, whose Covenant to pay the Mortgage Money is a Surety only for the Land.—*
- 5. *Of Exoneration out of the Assets of a Husband, who has mortgaged his Wife's Estate.—*
- 6. *Of the Title of a Devisee of Mortgaged Land to Exoneration out of Freehold Land descended, or Land devised, in trust for, or charged with, the payment of Debts.—*
- 7. *Of the Title of a Devisee of mortgaged Land to contribution from other Land devised.—*
- 8. *Of the Title of an Heir at Law of mortgaged Land to exoneration out of Real Estate, charged by the Ancestor's Will with the payment of Debts.—*
- 9. *Miscellaneous Points of the General Subject of Exoneration of mortgaged Land.*

*1. ON a loan of money on mortgage, the mortgagor contracts a debt; by specialty, if the mortgagor enters into a [*357] bond, or covenant, to pay the money, and by simple contract, if there is no such bond or covenant. (a) The mortgage creates a debt, and, in a Court of Equity, the land mortgaged is a pledge only for the money borrowed. (b) And because the loan creates a debt, and the land mortgaged is a pledge only, the mortgagee is, in equity, entitled to be paid the debt out of the personal assets of the mortgagor, although the latter has not entered into a bond or covenant for the payment of it. (c) And

(a) *Waring v. Ward*, 7 Ves. 336; *Aldrich v. Cooper*, 8 Ves. 394; *Ex parte Earl Digby*, Jacob, 239.

(b) *Bartholomew v. May*, 1 Atk. 487; *Waring v. Ward*, 7 Ves. 336.

(c) *Cope v. Cope*, 2 Salk. 449; *Lloyd v. Thursby*, 9 Mod. 5th ed. 463, and stated from MS. 2 Cruise Dig. 2d ed. 163; *Waring v. Ward*, 7 Ves. 336.

for the same reasons, because the loan creates a debt, and the land is a pledge only, (*d*) if a mortgage of land of inheritance is made, and the mortgagor also gives a bond or covenant to pay the money borrowed, and the land descends to his eldest son, or other immediate heir at law, such heir is entitled to have the mortgaged land exonerated, by payment of the debt out of the mortgagor's personal assets. (*e*) And, contrary to an old decision, (*f*) a devisee of such mortgagor is now held to be entitled to the same benefit. (*g*) And when there is no bond or covenant to pay the mortgage money, and the debt is a simple contract debt, in this case [*358] also the money *is, for the benefit of a devisee, (*h*) or heir at law, payable out of the mortgagor's personal assets. (*i*)

But it is observable, that against this exoneration of the real estate by payment of a mortgage debt out of the mortgagor's personal assets, a Court of Equity will protect the other creditors of the mortgagor; (*j*) a legatee, to whom a specific legacy is bequeathed by the mortgagor; and (a point which, at a distinct period, was "not yet settled,") (*k*) a legatee, to whom a general legacy of part of his personal estate is bequeathed by him; (*l*) and, farther, the mortgagor's widow's paraphernalia. (*m*)

But such exoneration is allowed, although it may wholly defeat the claims of the next of kin of the mortgagor on his intestacy, (*n*) or the customary or orphanage part by the custom of London; (*o*) and, perhaps it may be stated, notwithstanding it may partly defeat a legacy of all the mortgagor's personal estate, in a case where it does not appear to be the testator's intention to bequeath this legacy specifically. (*p*) And the

(*d*) 1 Atk. 487; 7 Ves. 336.

(*e*) *Cope v. Cope*, 2 Salk. 449; *Cornish v. Mew*, 1 Ch. Cas. 271; *Anon.* 2 Ch. Cas. 4; *Popley v. Popley*, ib. 84; *White v. White*, 2 Vern. 43, and 3d ed. 44, n. (2); *Wood v. Fenwick*, 1 Eq. Cas. Abr. 270; *Evlyn v. Evlyn*, Sel. Ca. Ch. 80; *Fox v. Fox*, 1 West Cas. T. Hardw. 162, 1 Atk. 463; *Hill v. Bishop of London*, 1 Atk. 621; *Galton v. Hancock*, 2 Atk. 435; *Waring v. Ward*, 7 Ves. 336; *Noel v. Lord Henley*, Dan. 329. See also *Hardr.* 512, and *Lucey v. Bromley*, Fitzg. 41.

(*f*) *Cornish v. Mew*, 1 Ch. Cas. 271, cited 2 Atk. 436. See also *Lovel v. Lancaster*, 2 Vern. 183, cited 1 Atk. 487.

(*g*) *Pockley v. Pockley*, 1 Vern. 36; *Popley v. Popley*, S. C., 2 Ch. Cas. 84; *Starling v. Drapers' Company*, Cas. T. Finch, 401; *Johnson v. Milksope*, 2 Vern. 112; *Anon.* 2 Freem. 204, Ca. 278 b.; *Evlyn v. Evlyn*, Sel. Ca. Ch. 80; *Parsons v. Freeman*, Amb. 115; *Bartholomew v. May*, 1 Atk. 487, 1 West Cas. T. Hardw. 255; *Galton v. Hancock*, 2 Atk. 424, 426, 437; *Philips v. Philips*, 2 Bro. C. C. 273; *Hale v. Cox*, 3 Bro. C. C. 322; *Astley v. Earl of Tankerville*, 3 Bro. C. C. 545; *Noel v. Lord Henley*, Dan. 329, 336.

(*h*) *King v. King*, 3 P. W. 358.

(*i*) *Cope v. Cope*, 2 Salk. 449; *Howell v. Price*, 1 P. W. 291, 2 Vern. 701, and 3d ed. n. (4), *Prec. Ch.* 423, 477, *Gilh. Eq. Rep.*

106; *Balah v. Hyham*, 2 P. W. 455; *Meynell v. Howard*, *Prec. Ch.* 61; *Earl of Tankerville v. Fawcett*, 1 Cox, 239; *Waring v. Ward*, 7 Ves. 336.

(*j*) *Anon.* 2 Ch. Cas. 4; *Rider v. Wager*, 2 P. W. 335; *Bartholomew v. May*, 1 Atk. 487; *Robinson v. Gee*, 1 Ves. 252; *Tweddell v. Tweddell*, 2 Bro. C. C. 107; *Hamilton v. Worley*, 2 Ves. jun. 65, 4 Bro. C. C. 204.

(*k*) *White v. White*, 2 Vern. 43.

(*l*) *Cope v. Cope*, 2 Salk. 449; *Rider v. Wager*, 2 P. W. 335; *Tweddell v. Tweddell*, 2 Bro. C. C. 107; *Earl of Tankerville v. Fawcett*, 1 Cox, 237, 2 Bro. C. C. 57; *Hamilton v. Worley*, 2 Ves. jun. 65, 4 Bro. C. C. 204.

(*m*) *Tipping v. Tipping*, 1 P. W. 729; *Puckering v. Johnson*, ib. 731, n.

(*n*) *Rider v. Wager*, 2 P. W. 335; *Hale v. Cox*, 3 Bro. C. C. 322; *Waring v. Ward*, 5 Ves. 670.

(*o*) *Rider v. Wager*, 2 P. W. 335; and *Ball v. Ball*, ib. 5th ed. n. (a). See also *Pockley v. Pockley*, 1 Vern. 36, *Popley v. Popley*, S. C., 2 Ch. Cas. 84, on the widow's customary moiety in the province of York.

(*p*) See, nevertheless, *Bishop v. Sharp*, 2 Freem. 276, cited ib. 278; in which case, however, from the report of it in 2 Vern. 469, the bequest appears to have been, after legacies bequeathed, of the residue of the testator's personal estate. See *Howe v. Earl*

same exoneration is allowed, although contrary, it should seem, to a former decision, (g) notwithstanding it may wholly defeat a residuary bequest in the mortgagor's will. (r)

*When the mortgage debt has been paid out of the personal assets, equity will, if necessary, aid the other creditors [*359] of the mortgagor, (s) and also the legatees, general or specific, in his will, (t) by marshalling the mortgagor's assets, and throwing those debts or legacies on the real estate, which, to the benefit or either heir at law, (u) or devisee, (v) has been exonerated out of the personal estate.

And where the mortgage debt had not yet been paid out of the personal assets, equity has, in the case of a specific legacy, aided the legatee, by decreeing the legacy to go to him, and the heir at law to take the land, burthened with the debt charged on it. (w)

The heir of an original mortgagor, or a person who himself has made the mortgage, has, however, in some cases, and in two instances where the mortgage was made to pay the debts of a previous owner of the estate, been held not to be entitled to have the mortgaged land exonerated out of his ancestor's personal assets; the intent of the mortgagor being plain, to make the land the first fund for the payment of the money. (x)

And it appears to be clear that, on a devise by a mortgagor, he may, if he pleases, subject the land to discharge the incumbrance on it; and, except as against the mortgagee, exempt by this means his personal estate, and consequently a residuary legatee in the will, or, if such personal estate is there undisposed of, the testator's next of kin, from the payment of the mortgage debt. (y) On a devise, however, of land, "subject to the incumbrances that *are or shall be upon it," or "subject to a mortgage of 1000*l.* and interest to A.,"—these terms only [*360] will not, it seems, be sufficient to burthen the land with a mortgage debt on it, and exempt the testator's personal assets from the payment of the mortgage; such terms expressing no more than what is implied on a devise of mortgaged land. (z)

2. From the principle that a loan creates a debt, and the land is a

of *Dartmouth*; 7 Ves. 137, and *Lucey v. Bramley*, Fitzg. 41.

(g) *Bishop v. Sharp*, 2 Vern. 469, 2 Freem. 276, cited 2 Freem. 278.

(r) *Hawes v. Warner*, 3 Ch. Rep. 206, 2 Vern. 477, 2 Freem. 277, 3 Bro. P. C. ed. Toml. 21; *Anon.* 2 Freem. 204, Ca. 278 b.; *White v. White*, 2 Vern. 43; *Moore v. Earl of Meath*, cited 2 Vern. 470; *Rider v. Wager*, 2 P. W. 335; *Robinson v. Gee*, 1 Ves. 252; *Fox v. Fox*, 1 West Cas. T. Hardw. 162; *Philips v. Philips*, 2 Bro. C. C. 273; *Hamilton v. Worley*, 2 Ves. jun. 65, 4 Bro. C. C. 204.

(s) *Robinson v. Gee*, 1 Ves. 252.

(t) *Anon.* 2 Ch. Cas. 4; *Lutkins v. Leigh*, Cas. T. Talb. 53; *Tipping v. Tipping*, 1 P. W. 729, 730; *Robinson v. Gee*, 1 Ves. 252; *Forrester v. Lord Leigh*, Amb. 171, 174; *Norris v. Norris*, 2 Dick. 542; *Norman v. Morrell*, 4 Ves. 769; *Aldrich v. Cooper*, 8 Ves. 397.

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(u) *Anon.* 2 Ch. Cas. 4; *Lutkins v. Leigh*, Cas. T. Talb. 54.

(v) *Lutkins v. Leigh*, Cas. T. Talb. 53.

(w) *Oneal v. Mead*, 1 P. W. 693. See also *Earl of Tankerville v. Fawcett*, 1 Cox, 237, 2 Bro. C. C. 57.

(x) *Hamilton v. Worley*, 2 Ves. jun. 62, 4 Bro. C. C. 199; *Earl of Tankerville v. Fawcett*, 1 Cox, 237, 2 Bro. C. C. 57; *Perkins v. Bayntun*, 2 P. W. 5th ed. 664, n. See also *Hancox v. Abbey*, 11 Ves. 189.

(y) *Milnes v. Slater*, 8 Ves. 295, 305.

(z) *Serle v. St. Eloy*, 2 P. W. 386, and 5th ed. n. (1), cited 2 Atk. 437, and 1 Bro. C. C. 461; *Astley v. Earl of Tankerville*, 3 Bro. C. C. 545, 1 Cox, 82. See *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; and, farther, on a devise, "subject to incumbrances," *Earl of Kinnoul v. Money*, 3 Swanst. 202, n., and *Barnewell v. Lord Cawdor*, 3 Madd. 453.

pledge only, it has followed that the heir, or devisee, of the original mortgagor is entitled to throw the burthen of the debt on such mortgagor's personal estate. (a) But the same principle does not lead to this farther consequence, that the debt contracted by one person, the original mortgagor, is payable out of the personal assets of another person, namely, a succeeding mortgagor, become so by either descent or devise. There is, indeed, a principle which prevents this consequence. This principle is, that such acquisition by descent or devise does not of itself remove the personal debt of the original mortgagor from him, and make it the personal debt of the party so afterwards become the mortgagor. (b) And hence it appears to have followed, that where a mortgage of land is made, not by a testator himself, but by an ancestor, namely, by the testator's father, here the heir at law, or devisee, of the son is not entitled to have the mortgage land exonerated out of the son's personal assets; (c) although the son has, on a transfer of the mortgage, entered into a bond, or covenant, with the assignee of the mortgage, to pay the money; (d) [*361] and although the son desires in his will that all his debts be *discharged by his executor. (e) The bond, or covenant, from the son will make the mortgage debt his personal debt, so far as to entitle the assignee of the mortgage to be paid out of the son's personal assets; (f) but, with reference to exoneration of the land for the benefit of the heir at law, or devisee, of the son, the same bond or covenant is an auxiliary security only, as a surety for the land, and leaves the land first responsible. (g)

The personal assets of a devisee of land, mortgaged by his testator, have been held not to be liable to exonerate such land, although, on a transfer of the mortgage, the devisee covenanted with the assignee to pay the mortgage money, and afterwards agreed to raise the interest from four to five per cent., and covenanted to pay such interest. (h)

The personal assets of an heir at law, or devisee, of land, mortgaged by a former owner, will, however, be liable to exonerate the estate from the mortgage debt, if by any means, as by a new mortgage transaction, the heir or devisee makes such debt of the former owner his own debt. (i)

It has been seen, that the heir at law of the son and heir of the original mortgagor is not entitled to have the land exonerated out of the heir's or son's personal estate. And in *Scott v. Beecher* it was decided, that the heir at law of a devisee of the original mortgagor was not entitled to have the land exonerated out of the devisee's personal assets, namely,

(a) 1 Atk. 487; 7 Ves. 336.

(b) 7 Ves. 336.

(c) *Cope v. Cope*, 2 Salk. 449; *Lawson v. Hudson*, or *Lawson*, 1 Bro. C. C. 58, 8 Bro. P. C. ed. Toml. 424; *Woods v. Huntingford*, 3 Ves. 131; *Waring v. Ward*, 7 Ves. 336; *Noel v. Lord Henley*, Dan. 330, 336. See also *Lord Howard of Effingham v. Napier*, 5 Bro. P. C. ed. Toml. 221, cited 5 P. W. 664, and *Hancox v. Abbey*, 11 Ves. 189.

(d) *Evelyn v. Evelyn*, 2 P. W. 659, 664; *Leman v. Newnham*, 1 Ves. 51; *Earl of Tankerville v. Fawcett*, 1 Cox, 239, 2 Bro. C. C. 57; *Waring v. Ward*, 7 Ves. 336.

(e) *Leman v. Newnham*, 1 Ves. 51; *Lawson v. Hudson*, 1 Bro. C. C. 58.

(f) *Leman v. Newnham*, 1 Ves. 53; *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 464; *Billinghurst v. Walker*, 2 Bro. C. C. 608; *Woods v. Huntingford*, 3 Ves. 131.

(g) *Evelyn v. Evelyn*, 2 P. W. 664.

(h) *Shafto v. Shafto*, 1 Cox, 207, 2 P. W. 5th ed. 664, n., cited 7 Ves. 337, and *Dan.* 336.

(i) *Donisthorpe v. Porter*, 2 Eden, 162, Amb. 600; *Lushington v. Sewell*, 1 Sim. 435, 477, 478; *Woods v. Huntingford*, 3 Ves. 131.

personal estate bequeathed by the original mortgagor to the devisee of the land, notwithstanding this personal estate constituted assets to pay the debts of the original mortgagor. In the case mentioned, one J. T. mortgaged a copyhold estate, and by his will devised all his estate and effects to his wife, and appointed her executrix. The wife died *in-
testate; and it was held that her heir at law, to whom the [*362] copyhold descended from her, was not entitled to have the land exonerated out of the mortgagor's personal estate bequeathed to his wife; and this decision was made chiefly, if not wholly, on this ground,—that “by the gift to her as residuary legatee, the personal estate of J. T. became *her* personal estate; but the mortgage debt of J. T. was not *her* debt, and *her* heir therefore has no equity to pay off this mortgage out of *her* personal estate.”(j)

3. The heir at law, or devisee, of a purchaser of mortgaged land,(k) or a legatee of a purchaser of mortgaged leaseholds for years,(l) is not entitled to have the mortgaged debt paid out of the personal assets of such purchaser; although, on the purchase, the purchaser entered into a bond, or covenant, with the vendor, to pay such debt;(m) or after, on a transfer of the mortgage, he, not to make the debt his own, but with the different view merely to effect the transfer, covenanted with the assignee to pay it;(n) and notwithstanding the purchaser, by his will, devises or charges other property, real or personal, with the payment of all his debts;(o) unless he has by some act,(p) as by a part of the purchase transaction,(q) or by a new contract with the mortgagee,(r) or, *by greater reason, by both these ways,(s) manifested [*363] an intention to make the mortgage debt the debt of himself.

4. It has been shown, that an heir at law, or devisee, of A., the son and heir of the original mortgagor, is not entitled to exoneration out of the assets of A., although, on a transfer of the mortgage, A. covenanted to pay the money. The principles are, that the descent to A. does not remove the debt from his father, and make it the personal debt of himself, and that the covenant by A. is only as a surety for the land.(t) The same principles have been applied to a case, where a tenant in tail, under a settlement of land mortgaged before the settlement, covenanted on a transfer of the mortgage to pay the money. In this case, Sir E. B.

(j) 5 Madd. 96.

(k) *Parsons v. Freeman*, Amb. 115; *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454, 464; *Tweddell v. Tweddell*, 2 Bro. C. C. 101, 152, cited 7 Ves. 337, and 14 Ves. 423; *Billinghurst v. Walker*, 2 Bro. C. C. 604, cited 14 Ves. 425; *Butler v. Butler*, 5 Ves. 534; *Waring v. Ward*, 7 Ves. 332. See also *Pockley v. Pockley*, 1 Vern. 36, cited 2 Bro. C. C. 107; *Earl of Belvedere v. Rochfort*, 5 Bro. P. C. ed. Toml. 299, cited 2 Bro. C. C. 107, and 3 Ves. 131; and *Forrester v. Lord Leigh*, Amb. 171, 2 P. W. 5th ed. 664, n.

(l) *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454. See also *Earl of Oxford v. Lady Rodney*, 14 Ves. 417.

(m) *Tweddell v. Tweddell*, 2 Bro. C. C. 101, 152, cited 3 Ves. 131, 132; *Butler v.*

Butler, 5 Ves. 538; *Waring v. Ward*, 7 Ves. 337.

(n) *Billinghurst v. Walker*, 2 Bro. C. C. 608; *Waring v. Ward*, 7 Ves. 336; *Forrester v. Lord Leigh*, Amb. 173, 2 P. W. 5th ed. 664, n.

(o) *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; *Butler v. Butler*, 5 Ves. 534.

(p) See *Woods v. Huntingford*, 3 Ves. 130, 132.

(q) *Parsons v. Freeman*, Amb. 115, 174, n. A., 2 P. W. 5th ed. 664, n.; *Waring v. Ward*, 5 Ves. 670, 7 Ves. 332.

(r) *Earl of Oxford v. Lady Rodney*, 14 Ves. 417.

(s) *Woods v. Huntingford*, 3 Ves. 130, cited 5 Ves. 539; *Earl of Oxford v. Lady Rodney*, 14 Ves. 417.

(t) *Evelyn v. Evelyn*, 2 P. W. 659, 664; *Waring v. Ward*, 7 Ves. 336.

married the daughter of Sir T. W., and, for raising the daughter's portion, the father mortgaged part of his estate; and died, leaving the daughter his heir. She afterwards joined with her husband in a deed and fine, whereby she settled her estate on her husband and herself, and the heirs male of the body of her husband. The mortgagee wanting his money, Sir E. B., the husband, joined in an assignment of the mortgage, and covenanted that he, or his wife, would pay the money. And the question being, whether by reason of the covenant from Sir E. B., his personal estate should be liable to pay the mortgage debt, it was decreed by Lord Cowper, "that this covenant by Sir E. should not oblige his personal estate to go in ease of the mortgaged premises; forasmuch as the debt being originally Sir T. W.'s, and continuing to be so, the covenant, on transferring the mortgage, was an additional security for the satisfaction only of the lender, and not intended to alter the nature of the debt."(*u*)

5. Where a husband and wife are seised of land in right of the wife, and the husband borrows money for his own use, as to pay his debts, or to buy an estate, or a commission in the army, or an appointment to a [*364] place, and he and his wife join in a mortgage *of the land, and the money is accordingly applied to the husband's use, (*v*) such mortgage makes this debt the debt of the husband, and his personal and real(*w*) assets must exonerate his wife's estate so mortgaged. (*x*) And if the land is mortgaged for a term of years, and the husband afterwards pays off the mortgage, and takes an assignment of the term in trust for himself, with the intent to continue the charge on the land, and to entitle the husband to be repaid the mortgage money paid off by him, equity will not allow this repayment, but will decree the term to be assigned, in trust for the owners of the inheritance. (*y*)

The assets of the husband will not, however, be liable to exonerate the estate of the wife, if the money borrowed was not applied to the use of the husband, but to other purposes, as to pay the wife's debts contracted before her marriage. (*z*) And parol evidence is admissible to prove the application of the money, either to the use of the husband or of the wife, or to other purposes. (*a*) And it seems that parol evidence is admissible to prove that the money was not applied to the use of the husband, and that, consequently, the exoneration of the wife's estate may be prevented by this evidence, notwithstanding the terms of the mortgage deed express, that the money was borrowed for the husband's use. (*b*) But parol evidence is, it appears, not admissible to prove that

(*u*) *Bagot v. Oughton*, 1 P. W. 347.

(*v*) See 3 Bro. C. C. 209, and 1 Ves. jun. 184.

(*w*) *Robinson v. Gee*, 1 Ves. 252.

(*x*) *Earl of Huntingdon v. Countess of Huntingdon*, 2 Vern. 437, 2 Bro. P. C. ed. Toml. 1; *Pocock v. Lee*, 2 Vern. 604; *Tate v. Austin*, 1 P. W. 264, 2 Vern. 689; *Lacum v. Mertins*, 1 Ves. 312; *Parteriche v. Powlet*, 2 Atk. 384; *Earl of Kinnoul v. Money*, 3 Swanst. 202, n., and cited 3 Bro. C. C. 206, 208, 211, and 1 Ves. jun. 186; *Astley v. Earl of Tankerville*, 3 Bro. C. C. 545, 1 Cox, 82.

(*y*) *Earl of Huntingdon v. Lady Huntingdon*, 2 Bro. P. C. ed. Toml. 1.

(*z*) *Lewis v. Nangle*, 1 Cox. 240, 2 P. W. 5th ed. 664, n., Amb. 150, 3 Swanst. 212, n.; *Earl of Kinnoul v. Money*, 3 Swanst. 202. See also *Rayson, or Ranson, v. Sacheverel*, 1 Vern. 41, and 3rd ed. n. (1), 2 Ch. Cas. 98, cited 3 Bro. C. C. 210, and 1 Ves. jun. 185; and *Ex parte Earl Digby, Jacob*, 235.

(*a*) *Earl of Kinnoul v. Money*, 3 Swanst. 202, n.; *Clinton v. Hooper*, 3 Bro. C. C. 209, 214, 1 Ves. jun. 184, 188.

(*b*) *Clinton v. Hooper*, 3 Bro. C. C. 209, 214. See 1 Ves. jun. 188.

money, applied to the use of the husband, was intended to be a gift by the wife to him.(c) An equity *will not exonerate the wife's [*365] estate out of the assets of the husband, if after the husband's death she by her declarations, although by parol only, to his executor clearly disclaims her right. On this ground was decided *Clinton v. Hooper*, where Lord Thurlow likened the case to that of an heir at law seeking exoneration out of his ancestor's personal assets. "Suppose," he said, "the heir at law was to declare to the executor, that he would not press him for payment of the debt; and, upon that assurance, the executor was to proceed in payment of the legacies; such parol declarations would be sufficient to bar the heir from coming into this Court for payment of the debt; and my opinion is, that the case of the wife is *in toto* the case of the heir."(d) And to the same effect his Lordship, at the conclusion of his judgment stated,—“I cannot distinguish this case from the case of the heir; for if the heir will tell the executor to pay the legacies, and that he will not press him for the exoneration of his estate, and the executor pays upon that assurance, the executor shall not be called upon afterwards, or the legatees be obliged to refund. It would be contrary to the rules of equity, to say that the heir should not be barred, by such a concession, from his claim; it would be countenancing, as it were, a mere fraud upon the executor, if the heir was allowed to call upon him after such a disclaimer. In this case the wife has, by her declarations to the executor, clearly disclaimed her right; and I do not think it material, whether the legatee were paid before or after this concession.”(e)

When the mortgage debt is the debt of the husband, it is payable before all legacies, general or specific, bequeathed by him out of his personal estate; but all his other debts, although by simple contract only, are, it seems, to be paid before this mortgage debt.(f) And yet Lord Hardwicke, it is material to state, appears to have been of opinion, that if the mortgage has been paid off out of the husband's assets, “none of his creditors *have a right to stand in the place of the mortgagee, to come round on the wife's estate.”(g) [*366]

6. On a devise of mortgaged land by the original mortgagor, the devisee is entitled not only to have the land exonerated out of the mortgagor's personal assets,(h) but it is decided also, that if the mortgage debt is, as by means of a bond or covenant, a specialty debt recoverable against the heir of the mortgagor, and there is a deficiency of personal assets to pay off the mortgage, the devisee of the mortgaged land is entitled to exoneration, or to have the mortgage debt paid, out of real assets, as freehold land, descended to the heir at law of the mortgagor.(i)

It is also determined, that, whether the mortgage debt is one by specialty or by simple contract only, the devisee of the mortgaged land is entitled to exoneration out of real estate devised by the mortgagor, in trust for the payment of his debts,(j) and out of real estate devised by

(c) *Clinton v. Hooper*, 3 Bro. C. C. 214, 1 Ves. jun. 188.

(d) 3 Bro. C. C. 210, 1 Ves. jun. 185.

(e) 3 Bro. C. C. 214, 1 Ves. jun. 189.

(f) *Tate v. Austin*, 1 P. W. 264, 2 Vern. 689, cited 3 Bro. C. C. 211.

(g) *Robinson v. Gee*, 1 Ves. 252.

(h) 2 Atk. 436.

(i) *Galton v. Hancock*, 2 Atk. 424, 427, 430; *Davies v. Topp*, 1 Bro. C. C. 524. See also *King v. King*, 3 P. W. 358.

(j) *Serle v. St. Eloy*, 2 P. W. 386, and 5th ed. n. (1); *Bartholomew v. May*, 1 Atk. 487; *Marchioness of Tweeddale v. Earl of Coventry*, 1 Bro. C. C. 240. See also *Sir E. Moor's case*, cited *Precedent Ch. 61*.

the mortgagor, and charged by the will with the payment of his debts,^(k) and, it seems also, out of real estate descended to the heir of the mortgagor, charged by the will of the latter with the payment of his debts.^(l)

In *Barnewell v. Lord Cawdor* it was further decided, that a descended estate was liable to pay off the mortgages on the estates devised, although the latter were devised "subject to the incumbrances" on them, and although the will exempted the testator's personal estate from the payment of those incumbrances.^(m)

7. A devisee of real estate mortgaged is not only entitled to exoneration out of personal estate, land descended, and land devised for, or [*367] charged with, the payment of debts,⁽ⁿ⁾ but he has "also a right to contribution from a devisee of unmortgaged land, if the mortgagor, by his will, charges all his real estate with the payment of his debts. As, if a person seised of two manors, P. and W., devises P. to A., and W. to B., and by his will charges all his real estate with the payment of his debts, and afterwards mortgages P.; A. is entitled to "contribution out of W., in order to reimburse P. what that had paid beyond its proportion," or, as it is differently expressed, A. "ought to have a proportionable contribution out of the manor of W., towards the payment of the mortgage debt."^(o)

8. In *Hill v. The Bishop of London*, Lord Hardwicke decided, "that the plaintiffs, the heirs at law, are entitled to the copyhold lands descended to them, disincumbered from a mortgage; which must be paid out of the personal estate, and, if not sufficient, then out the real estate, charged by the will of the testator with his debts."^(p)

9. In *Noel v. Lord Henley*, the mortgage debt of an original mortgagor was, by reason of his marriage settlement, the terms of which declared his intention to be, that, as between the persons entitled to his real and personal estate, the estate mortgaged should bear the burthen of the debt, held to be payable, not out of the personal assets of the mortgagor, but out of the money to arise from the sale of another estate, which by his will he directed to be sold for the purpose of paying off the mortgage on the estate settled.^(q) In *Bateman v. Bateman*, a person provided in his will, that if his personal estate, and his house and lands at W., should not pay his debts, then his executors should raise the same out of certain copyhold premises before devised by him. The testator, upon his marriage, had settled some freehold lands upon his wife and children, and covenanted that they were free from incumbrances. It happened, however, that these lands were subject to a prior mortgage. And it was decreed that the plaintiffs were entitled to have the settled estate exonerated *of the mortgage, out of the personal estate, and copy- [*368] hold estate devised for payment of debts.^(r) In *Clarke v. Samson*, leaseholds for years, incumbered by mortgage, were devised to

(k) *Serle v. St. Eloy*, 2 P. W. 386, and 509, 521, 3 Bro. P. C. ed. Toml. 64, 67, 68. 5th ed. n. (1); *Bartholomew v. May*, 1 See 2 Atk. 438.

Atk. 487, 1 West Cas. T. Hardw. 355.

(p) 1 Atk. 621.

(l) *King v. King*, 3 P. W. 358.

(q) *Dan.* 322, on appeal to H. L. from the decision reported *Dan.* 211 and 7 *Price*, 241.

(m) 3 Madd. 453.

(n) *Galton v. Hancock*, 2 Atk. 430; *Serle v. St. Eloy*, 2 P. W. 386, and 5th ed. n. (1).

(r) 1 Atk. ed. Sand. 421, and n. (1.)

(o) *Carter v. Barnadiston*, 1 P. W. 505,

the testator's son, who was also appointed executor. The son, on his marriage, settled this property; and on the whole circumstances, which were special, of the case, the issue of that marriage were held not to be entitled to have the mortgage paid off out of their father's personal assets. (*s*)

SECTION II.

OF EXONERATION OF LAND CHARGED; WHERE THE PRINCIPLE, ON WHICH MORTGAGED LAND IS EXONERATED, IS INAPPLICABLE.

WHEN a person borrows money, and mortgages land to secure the payment of it, the loan creates a debt; and if the mortgagor covenants to pay the money, it is not the covenant, but the loan, by which the debt is created. The mortgagor covenants to pay a debt, and the simple contract debt created by the loan is, by the covenant, made a debt by specialty. (*t*)

A debt may be created by a covenant to pay money which is not borrowed, (*u*) and an action of debt may be brought on the covenant. (*v*) If, therefore, in a marriage settlement, A. conveys land to the use of trustees for a term of years, in trust to raise portions for younger children, and A. covenants to pay the portions, by this covenant A. makes himself a debtor. (*w*)

A covenant which is not to pay money, will also in some cases create a debt, in this sense,—that the covenant if broken, will create a demand for a sum uncertain, namely, a demand for damages. Thus, a covenant by a lessor with the lessee, for quiet enjoyment during the term, entitles the lessee, if the covenant is broken, to an action of covenant against the lessor, to recover damages for the injury sustained by him. And if damages are recovered, and judgment follows, the lessee will be a judgment creditor to the amount of those damages. (*x*)

A covenant, which is not to pay money, will also, in some cases, create a debt, in this sense,—that if the covenant is broken, then, notwithstanding an action at law has not been brought for damages, the covenantee will, in equity, be a creditor, and by specialty, and entitled to come in with other specialty creditors, and be paid a sum of money equal to the estimated damages sustained by him. (*y*) Thus, where a person on his marriage covenanted to settle on the wife, for her life, lands that should be of the value of 60*l.* per annum, but did not make this settlement, and by his will charged all his estate, real and personal, with the payment of his debts; here, on a bill brought by the creditors for the satisfaction of their debts, Lord Chancellor Parker said, “The covenant

(*s*) 1 Ves. 100.

(*t*) 7 Ves. 336; 8 Ves. 394; Jacob, 238, 239.

(*u*) Sanders v. Marks, 3 Lev. 429; Plummer v. Marchant, 3 Burr. 1380.

(*v*) Sanders v. Marks, 3 Lev. 429.

(*w*) Lechmere v. Charlton, 15 Ves. 193.

(*x*) Earl of Bath v. Earl of Bradford, 2 Ves. 587. See also 2 Bl. Com. 438.

(*y*) Freemoult v. Dedire, 1 P. W. 429; Parker v. Harvey, 11 Vin. Abr. 292, 2 Eq. Cas. Abr. 460; Sutton v. Mashiter, 2 Sim. 513. See Whitchurch v. Lady Bayntun, 2 Vern. 272, and Knight v. Knight, 3 P. W. 331.

for settling lands of the value of 60*l.* per annum on the wife for her life does not specially bind any lands; wherefore, as touching that, the wife must come in only as a specialty creditor with the other specialty creditors. And in order to settle the quantum of this demand, let the Master set an estimate on the wife's estate for life, namely, at so many years' purchase, and then the wife to come in as a creditor by specialty, for so much money."^(z)

A covenant to settle land, but which does not specifically bind any land, may create, it has been seen, a debt, in the senses, that, if broken, it will entitle the covenantee, at law to recover damages, and in equity to come in and be paid as a specialty creditor. But where there is a covenant to settle particular lands, and which are in consequence specifically bound, here, although, if the covenant is broken, the covenantee may at [*370] law be entitled to recover *damages,^(a) yet in equity this covenant makes the covenantor a trustee of the land for the purposes of the covenant;^(b) and where the covenantor so becomes trustee, it appears that, with reference to exoneration, a debt is not, in equity created by the covenant. Thus, as the covenantor is, in equity, trustee, in equity a debt is not, with reference to exoneration, created by his covenant in marriage articles to settle particular lands for a jointure,^(c) or to settle particular lands, and to limit in the settlement a term of years, in trust to raise portions for daughters.^(d)

It farther appears that a person does not make himself a debtor, because, by virtue of a power to charge land with the payment of money, he executes an appointment under it;^(e) or because in a marriage settlement he limits a term of years, in trust to raise portions for younger children.^(f)

The exoneration of mortgaged land out of the assets of the mortgagor, proceeds from the principle, that the loan creates a debt, for the payment of which the land is, in equity, a pledge only, in aid of the mortgagor's assets liable to satisfy the debt.^(g)

This principle does not apply where there is no debt. And, accordingly, where, under a power to charge land with money, an appointment is made;^(h) or, if the appointment is revoked, the charge is by some means kept on the land, which it is not meant shall be withdrawn from the charge;⁽ⁱ⁾ in these cases, the owner of the land is not entitled to exoneration. Also, if in a marriage settlement A. creates a charge on land, by the limitation of a term of years, in trust to raise the portions of younger children, and A. does not covenant to pay the money; here, [*371] likewise, the land must bear the burthen imposed on it, and the owner has no *ground or pretence whatever to have the estate disincumbered out of the assets of A.^(j)

(z) *Freemoult v. Dedire*, 1 P. W. 429.

(a) 2 P. W. 438.

(b) *Freemoult v. Dedire*, 1 P. W. 429; *Edwards v. Freeman*, 2 P. W. 438.

(c) *Lady Coventry v. Lord Coventry*, 1 Stra. 596, 603; *Freemoult v. Dedire*, 1 P. W. 429.

(d) *Edwards v. Freeman*, 2 P. W. 437, 439.

(e) 1 Cox, 175.

(f) *Burgoigne v. Fox*, 1 Atk. 575; *Bur-*

goyne v. Benson, S. C., 1 West Cas. T. Hardw. 340; *Lanoy v. Duke of Athol*, 2 Atk. 444, 445.

(g) 2 P. W. 438; 2 Atk. 445; *Jacob*, 238, 239.

(h) 1 Cox, 175.

(i) *Wilson v. Earl of Darlington*, 1 Cox, 172; cited in 4 Ves. 82, as *Wilson v. Lord Bath*.

(j) *Burgoigne v. Fox*, 1 Atk. 575; *Bur-*
goyne v. Benson, S. C., 1 West Cas. T.

The same principle does not apply, where a covenant creates a specific lien on land, and in equity makes the covenantor a trustee, and not a debtor. Thus, where these effects follow a covenant in marriage articles, to settle particular lands for a jointure; or to settle particular lands, and to limit in the settlement a term of years, in trust to raise portions for daughters; in these cases, the owner of the land is not entitled to exoneration out of the assets of the settler.^(k)

And, farther, the same principle does not apply to a charge on land, and covenant to pay the money charged; and where the covenant, although it creates a debt, is meant to be a security, auxiliary only to the charge. Thus, where in a marriage settlement A. creates a rent-charge of 500*l.* per annum in lieu of dower, and covenants to pay this annuity; or, where in a marriage settlement A. conveys to the use of trustees for a term of years, in trust to raise portions for younger children, and covenants to pay the portions; in these, and the like cases, the covenant by A. is, unless a contrary intention clearly appears, construed to be a security auxiliary only to the land, and the owner of the estate is consequently not entitled to have it exonerated out of the assets of A.^(l)

It is observable, that, in each of the cases, which have been applied to the principle, on which the owner of mortgaged land is entitled to exoneration, the charge on the land was not made by mortgage. It remains to notice the case of a mortgage, where the owner of the land may not be entitled to exoneration out of the assets of the mortgagor. The case is, where, by virtue *of a power to charge contained in a settlement, a charge is by a tenant for life created by a mort- [*372] gage of a term of years, either limited in the settlement, or created under the power, and, on which mortgage, the mortgagor does not covenant to pay the money. Here, notwithstanding the loan makes the mortgagor, or donee of the power, a debtor, and the money is borrowed for his use, and consequently the charge is a benefit to him, and his personal estate; yet the owner of the land is not entitled to exoneration out of his personal assets. And it follows, that this exoneration is not allowed, if the mortgage is made by a feme covert, and does not make the charge her personal debt, and no demand can be made on her for payment. And if the donee of the power, who makes the mortgage, covenants to pay the money; the exoneration of the land will depend upon, whether the personal security was meant to be the primary security, or only collateral; and it will, it should seem, be construed to be collateral only, unless a contrary meaning is clearly apparent.^(m)

Hardw. 340; *Lanoy v. Duke of Athol*, 2 Atk. ed. Sand. 444, and n. (1,) and 445, on the second settlement. See also *Ward v. Lord Dudley and Ward*, 2 Bro. C. C. 316, 1 Cox, 438.

(k) *Countess of Coventry v. Earl of Coventry*, 9 Mod. 12, 1 Stra. 596, 2 P. W. 222;

Edwards v. Freeman, 2 P. W. 435, 437, 438; both cases cited 2 P. W. 665.

(l) *Lanoy v. Duke of Athol*, 2 Atk. ed. Sand. 444, and n. (1); *Lechmere v. Charlton*, 15 Ves. 193.

(m) *Ex parte Earl Digby*, Jacob, 235.

SECTION III.

OF EXONERATION OF LAND DEVISED, CHARGED WITH DEBTS, OR LEGACIES, WHERE THE DEVISEE GIVES A BOND, OR PROMISSORY NOTE, TO PAY A DEBT OR LEGACY CHARGED.

WHERE real estate is devised, charged with the payment of debts, or of legacies, a bond or promissory note entered into by A., the devisee, to secure the payment of a debt or legacy so charged on the land, is, unless the intent of the bond or note is clearly contrary, *(n)* construed to be a security auxiliary only to the land, and consequently will not create a debt, which, to the exoneration of the land charged, the heir at law, or devisee of A., will be entitled to have paid out of A.'s personal assets. *(o)*

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*SECTION IV.

OF EXONERATION OF LAND DESCENDED; WHERE A BOND DEBT IS PAID BY THE HEIR.

EXECUTORS and administrators are bound by a bond, in which the obligor binds himself, and not expressly his executors and administrators. *(p)* But although the obligor binds himself, and his executors and administrators, yet this obligation will not be binding on his heir, who is not bound, unless he is for the purpose expressly named in the bond. *(q)*

When a person enters into a bond, as to perform covenants, or pay a sum of money, and thereby binds himself, his heirs, executors, and administrators, and the obligor dies, and it is required to put the bond in suit, the obligee may, if he pleases, first sue the heir, and need not first resort for satisfaction to the personal assets of the obligor. *(r)* But when the heir is sued, and the obligor's real assets descended are in consequence taken to satisfy the bond, in equity the heir is entitled to reimbursement out of his ancestor's personal assets, in the hands of his executor or administrator. *(s)* The heir is, it seems, entitled to this exoneration, notwithstanding it will wholly defeat a residuary bequest in the ancestor's will. *(t)* But it appears he is not entitled to such exoneration, if it will

(n) 2 Bro. C. C. 608.

(o) Basset v. Percival, 1 Cox, 268, 2 P. W. 5th ed. 664, n.; Mattheson v. Hardwicke, 2 P. W. 664, n.; Billingham v. Walker, 2 Bro. C. C. 604, cited 14 Ves. 425.

(p) 1 P. W. 721; 2 P. W. 197; 1 Freem. 125.

(q) Barber v. Fox, 2 Saund. 136, 1 Ventr. 150; Porter v. Bille, 1 Freem. 125; Crossen v. Honor, 1 Vern. 180.—Hardr. 512.

(r) Armitage v. Metcalf, 1 Ch. Cas. 74; Knight v. Knight, 3 P. W. 333.

(s) Armitage v. Metcalf, 1 Ch. Cas. 74; Anon. 2 Ch. Cas. 4; Anon. 1 Freem. 301, Ca. 364 b.; Anon. 2 Freem. 205, Ca. 278 c.; Knight v. Knight, 3 P. W. 331; Lutkins v. Leigh, Cas. T. Talb. 54; Mogg v. Hodges, 3 Ves. 52, 1 Cox, 11; Woods v. Huntingford, 3 Ves. 130.

(t) Hawes v. Warner, 3 Ch. Rep. 306, 3 Bro. P. C. ed. Toml. 21; Philips v. Philips, 2 Bro. C. C. 273; Hamilton v. Worley, 2 Ves. jun. 65, 4 Bro. C. C. 204.

prevent the payment of the ancestor's other debts,^(u) or of a legacy, pecuniary or specific, bequeathed by him,^(v) or if it will deprive his ancestor's widow of her paraphernalia.^(w)

*CHAPTER XXX.

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OF THE ORDER IN WHICH ASSETS ARE, BY A COURT OF EQUITY,
TAKEN TO PAY DEBTS.^(a)

WHERE assets have, beyond the general personal estate, consisted of,—

Real estate descended, and 2000*l.* by will appointed under a power to charge an estate, and specifically bequeathed in legacies;

Land descended, and land specifically devised;

Real estate in possession, real estate in reversion, specific legacies, and paraphernalia;

Land descended, and paraphernalia;

*Land descended, and land devised, and specific legacies;

An advowson in fee in gross descended, and freehold estates in

A COURT of Equity has, to pay debts, taken after the general personal estate,—

First, the real estate descended, and then the 2000*l.*^(b)

First, the land descended, and afterwards the land specifically devised.^(c)

First, the real estate in possession; next, the real estate in reversion; then the specific legacies; and, lastly, the paraphernalia.^(d)

To pay a debt by covenant; first, the land descended, and before the paraphernalia.^(e)

To pay bond debts, [*375] first, the land descended, and before the land devised, and also before the specific legacies.^(f)

To pay specialty debts; first, the advowson descended, and then,

(u) Anon. 2 Ch. Cas. 4; Luthins v. Leigh, Cas. T. Talb. 54.

(v) Anon. 2 Ch. Cas. 4; Tipping v. Tipping, 1 P. W. 730; Luthins v. Leigh, Cas. T. Talb. 54.

(w) Tipping v. Tipping, 1 P. W. 729.

(a) On the subject of this Chapter, see, besides the cases after referred to, also the following authorities.—Coxe v. Basset, 3 Ves. 155; Harmood v. Oglander, 6 Ves. 199, 206, 8 Ves. 106; Milnes v. Slater, 8 Ves. 295; Brookfield v. Bradley, Jacob, 632, 637; Hughes v. Doulben, 2 Bro. C. C. 614, 2 Cox, 170; Parnham v. Burroughs, 1 Dick. 63; Reeves v. Newenham, 1 Vern. & Scriv. 319, 483, 495, 2 Ridgew. P. C. 48; Thompson v. Lawley, 2 Bos. & P. 303, 310. And

see likewise Chapter XXIX. of the present Treatise.

(b) Bainton v. Ward, 2 Atk. ed. Sand. 173 and n. (2), also stated 2 Ves. 2, and from Reg. B. 7 Ves. 503, n.

(c) Pitt v. Raymond, cited 2 Atk. 434; Palmer v. Mason, 1 Atk. 505, (on another point, reported by name of Palmer v. May-sent, 1 Dick. 70, 1 West Cas. T. Hardw. 161); Powis v. Corbet, 3 Atk. 556. See also Probert v. Clifford, 2 P. W. 5th ed. 544, n., Amb. 6, and ed. Blunt, n., 1 West Cas. T. Hardw. 638, and 1 Atk. 440.

(d) Nicholas v. Southwell, Mos. 177.

(e) Tipping v. Tipping, 1 P. W. 279.

(f) Chaplin v. Chaplin, 3 P. W. 365, 367.

fee, and leasehold estates *pur auter vie*, devised;

Land devised for life, with remainders over; with power to tenant for life to lease for lives, by taking fines, and reserving small conventional rents; part of the land being let by the tenant for life in this manner, and part being let at rack-rents;

Real estate, and paraphernalia;

Land devised by A. to B., who, with C., was a surety for A., all three joining in a recognizance; Land which A., before his marriage, settled as a jointure on his wife, who was a purchaser without notice of the recognizance; and paraphernalia of the wife of A.;

Real estate, by will devised to trustees for the term of 500 years, in trust for the payment of debts, and subject to this trust, devised in remainders over; real estate, specifically devised by a codicil; and real estate, descended;

Paraphernalia; and real estate, which was subjected by will to the payment of debts;

Paraphernalia; and real estate, charged with the payment of debts, by a will which empowered the executrix to raise money for that purpose, by a mortgage of the estate;

"proportionably in average," the estates in fee, and *pur auter vie* devised. *(g)*

To pay bond debts; first, the land let at rack-rents, and then the land leased for lives at the small conventional rents. *(h)*

To pay simple contract debts; first, the real estate, and then the paraphernalia; the Court directing, in case the personal estate had been exhausted by specialty creditors, then the simple contract creditors to stand in their place, to receive a satisfaction, *pro tanto*, out of the testator's real estate; and declaring, that the paraphernalia should be applied to make good the deficiency. *(i)*

To satisfy the recognizance; first, the land devised by E. to B., then, the jointure land; next, the paraphernalia; and, lastly, the land of B. not devised to him, and of C., the other surety. *(j)*

First, the estate made subject to the 500 years' term; next, the estate descended; and, lastly, the estate specifically devised by the codicil. *(k)*

First, the real estate, and afterwards the paraphernalia. *(l)*

First, the charged estate, and before the paraphernalia. *(m)*

(g) Westfaling v. Westfaling, 3 Atk. 460.

(h) Manaton v. Manaton, 2 P. W. 234.

(i) Snelson v. Corbet, 3 Atk. 369.

(j) Tynt v. Tynt, 2 P. W. 542.

(k) Powis v. Corbet, 3 Atk. 558, cited, as Corbet v. Kynaston, 1 Bro. C. C. 527; also cited 8 Ves. 303; and the will in which case

is, in 3 Ves. 116, n., stated from Reg. B. See also Morrow v. Bush, 1 Cox, 185.

(l) Bingham v. Erneley, 2 Eq. Cas. Abr. 250, in marg.

(m) Boynton v. Parkhurst, 1 Bro. C. C. 576; Boyntun v. Boyntun, S. C., 1 Cox, 106.

Real estate devised, and, by a general charge in the will, made subject to the payment of debts; and real estate, which, by the failure of a devise in the will, descended to the testator's heir at law;

Real estate, which was subject to a mortgage, and was devised, and, by a general charge in the will, made liable to the payment of debts; and a freehold estate, purchased by the testator after making the will, and descended to his co-heiresses at law;

Freehold and leasehold estates, devised to trustees, in trust to sell for payment of debts; other freehold and leasehold estates specifically devised, and by the will charged with the deficiency, in case the money to be raised by the trustees should not be sufficient to discharge the debts; and a freehold estate, purchased by the testator after the making of his will, and descended to his heir at law;

A copyhold estate, which a testator willed that his executors should sell, in trust for payment of his debts; and freehold estates specifically devised;

Freehold and copyhold estates, devised to different persons, the copyhold being surrendered to the use of the will, and the testator having by his will expressly charged "all and singular his real estate" with the payment of his debts;

Real estates in the West Indies, and which a person devised to trustees, upon trust to receive the rents and profits, and apply the

First, the estate descended, and before the estate devised.(n)

First, the estate descended, which, to pay the debts, was decreed to be sold or mortgaged; next, the rents and profits of the same estate; and then the estate devised, and charged with the payment of debts.(o) [*377]

First, the estates devised, in trust to be sold to pay debts; then, the estates specifically devised, and charged with debts; and afterwards the estate descended.(p)

First, the copyhold estate, and before the freeholds; and although the copyhold was not surrendered to the use of the will.(q)

Freehold and copyhold, without priority; that is, "rateably, according to their value."(r)

First, and before the estate descended, the estates devised, and, by that devise or specific gift, expressly appropriated to, and se-

(n) *Williams v. Chitty*, 3 Ves. 545.

(o) *Davies v. Topp*, 1 Bro. C. C. 524, cited 2 Bro. C. C. 262. A similar case is *Wride v. Clarke*, 1 Dick. 382, 2 Bro. C. C. 261, n. *Rowe v. Beavis*, 1 Dick. 178, contains this general statement—"Rents and profits of a real estate descended are to be accounted for, and applied, before the inheritance is sold, and applied."

(p) *Donne v. Lewis*, 2 Bro. C. C. 257 cited 8 Ves. 125, 303.

(q) *Bixly, or Bixby, v. Eley*, 2 Dick. 698, 2 Bro. C. C. 325.

(r) *Growcock v. Smith*, 2 Cox, 397. See *Harris v. Ingledew*, 3 P. W. 91; also Chap. IV., Sect. IV., of the present Treatise.

same in payment of his debts; and an estate, which the testator purchased after the making of his will, and which, the will not being republished, descended to his heir.

Real estate devised, and charged by the will with the payment of debts, and to sell which estate for that purpose, a power was given to the executors; other real estate, specifically devised; and personal estate, specifically bequeathed;

Real estate, which a person mortgaged, and devised by his will; and real estate, which he afterwards purchased, and which, the will not being republished, descended to his heir at law;

Copyhold lands, which a person mortgaged, and devised to his nephew, in fee; and freehold lands, which the testator devised to his only son, in fee; the words of the latter devise being, "after all the testator's debts paid, the rest and residue of all his real and personal estate should go to his son;"

lected for the purpose of paying, the debts.^(s)

First, the real estate charged with the payment of debts; next, the rents and profits of the same estate; and if these funds were deficient, then the deficiency to be made good out of the personal estate specifically bequeathed, and the other real estate specifically devised, and each to contribute in proportion.^(t)

To pay the mortgage debt, (which was a debt by specialty,) first, the estate descended, and in exoneration of the devised estate.^(u)

To pay the mortgage debt; first, and in exoneration of the land mortgaged, the real estate devised to the son; and then the rents and profits of the real estate, that had been received by the son since the father's death.^(v)

[*379] *The authorities which have been mentioned, offer, it will be seen, two principal classes of cases,—one, where a will does not provide a real fund, or fund of real estate, for the payment of debts; and the other, where such a provision is contained in the will; and, in each of which classes, the question, on the order of the assets, lies between the testator's heir at law, and a party who claims under the ancestor's will, namely, a specific legatee, or a devisee.

When the will does not provide a real fund for the payment of debts, then the authorities mentioned appear to afford this general conclusion,—that in the case of debts by bond, or other special contract, binding the testator's heir at law, and which are not secured by mortgage, real es-

(s) *Manning v. Spooner*, 3 Ves. 114. On the word "selected" there used, see 8 Ves. 304. In the judgment in *Manning v. Spooner*, Sir R. P. Arden said, the heir could not avail herself of her right not to be called upon to contribute until the appropriated fund was exhausted, "except by being reimbursed out of the rents and profits of this trust fund. She cannot postpone the creditors. That was the case of *Lingard v. Lord Derby*, 1 Bro. C. C. 311. The testator may arrange be-

tween his heir and devisee; but not so as to take away from the creditor a fund he has a right to come upon." (3 Ves. 118). On *Lingard v. Earl of Derby*, and Lord Loughborough's opinion there expressed, see Chapter XV., Sect. I., of the present Treatise.

(t) *Silk v. Prime*, 1 Dick. 384, 1 Bro. C. C. 138, n. See 2 Bos. & P. 310.

(u) *Galton v. Hancock*, 2 Atk. 424, 435; cited 2 Bro. C. C. 263.

(v) *King v. King*, 3 P. W. 358.

tate descended is, to pay those debts, taken before either a specific legacy, (*w*) or real estate, which is specifically devised. (*x*)

When the will does provide a real fund for the payment of debts, then the authorities appear to afford these general conclusions, in the case of debts by bond, or other special contract, binding the testator's heir at law, and which are not secured by mortgage,—1. That to pay those debts, real estate purchased after the making of the will, and descended to the testator's heir at law, is taken before real estate devised, and, which devised estate is, by a *general* charge only, made by the will liable to such debts; (*y*) as where this charge is effected by an introductory clause, containing the general words, "As to my wordly estate, either real or personal, after payment of my debts, I give and dispose thereof in manner following," and by these additional words in a subsequent part of the will,—“I charge and make chargeable all my real and personal estate with the payment of my debts, and subject thereto, I devise,” &c; (*z*) or where the like charge is effected by the words, [*380] “I will that all my debts shall be paid, and I charge all my [*380] estates with the payment thereof, and, subject thereto, I devise,” &c. (*a*) —2. That to pay the like debts, real estate devised is taken before real estate purchased after the making of the will, and descended to the testator's heir at law, in instances where the devised estate is, by a *special* charge, made liable to the debts. (*b*)

Also, when the will does provide a real fund for the payment of debts, then the authorities mentioned appear to afford these farther general conclusions in the case of debts by bond, or other special contract, binding the testator's heir at law, and which are not secured by mortgage; namely, that, where a contrary intention does not appear in the will, a Court of Equity takes, to pay those debts, a real fund created (*c*) for the purpose, and only for the purpose, (*d*) of paying debts, before real estate devised, and, by a special charge in the will, made liable to the debts: (*e*) and real estate devised, and so specially charged, before real estate descended; (*f*) and whether such real estate descended was purchased after the making of the will, (*g*) or the testator was seised of it at the time the will was made: (*h*) and real estate descended before real estate devised, and which devised estate is, by a general charge only in the will, made liable to the debts; (*i*) and whether the real estate descended was pur-

(*w*) *Chaplin v. Chaplin*, 3 P. W. 365, 367; *Bainton v. Ward*, 2 Atk. ed. Sand. 172, and n. (2,) also stated 2 Ves. 2, and from Reg. B. 7 Ves. 503, n.

(*x*) *Chaplin v. Chaplin*, 3 P. W. 365, 367; *Palmer v. Mason*, 1 Atk. 505; *Westfaling v. Westfaling*, 3 Atk. 460.

(*y*) *Davies v. Topp*, 1 Bro. C. C. 524; *Wride v. Clarke*, 1 Dick. 382; *Williams v. Chitty*, 3 Ves. 545. See also 2 Bro. C. C. 262—266, 3 Ves. 117, 118.

(*z*) 1 Bro. C. C. 524, cited 2 Bro. C. C. 264.

(*a*) 1 Dick. 382; 2 Bro. C. C. 261, n.

(*b*) *Donne v. Lewis*, 2 Bro. C. C. 257; *Manning v. Spooner*, 3 Ves. 114.

(*c*) 8 Ves. 304.

(*d*) 3 Ves. 118.

(*e*) *Donne v. Lewis*, 2 Bro. C. C. 257, cited 8 Ves. 125, 303.

(*f*) *Donne v. Lewis*, above; *Powis v. Corbet*, 3 Atk. 558, cited, as *Corbet v. Kynaston*, 1 Bro. C. C. 527, also 8 Ves. 303, and the will in which case is in 3 Ves. 116, n., stated from Reg. B.; *Manning v. Spooner*, 3 Ves. 114.

(*g*) *Donne v. Lewis*, *Powis v. Corbet*, and *Manning v. Spooner*, above.

(*h*) 2 Bro. C. C. 262, 263, 265; 3 Ves. 118; 8 Ves. 303, 304. See 1 Bro. C. C. 527, 528.

(*i*) *Wride v. Clarke*, 1 Dick. 382, 2 Bro. C. C. 261, n.; *Davies v. Topp*, 1 Bro. C. C. 524, cited 3 Bro. C. C. 262; *Williams v. Chitty*, 3 Ves. 545.

chased after the making of the will, (*j*) or the testator was seised of it at the time the will was made, (*k*) and, in the latter case, the cause of the descent was a failure of a devise in the will: (*l*) and real estate devised, [*381] *and so generally charged, before real estate devised, and not made by the testator a fund for the payment of his debts: (*m*) and, consequently, to satisfy the debts mentioned, the different funds stand in the following order to be taken to pay them,—

1. A real fund created for the purpose, and only for the purpose of paying debts;
2. Real estate devised, and, by a special charge in the will, made liable to the debts;
3. Real estate descended;
4. Real estate devised, and, by a general charge only in the will, made liable to the debts: (*n*)
5. Real estate devised, and not made by the testator a fund for the payment of his debts: (*o*)

With regard to the place, which a testator's personal estate occupies in the range of assets, to be taken to pay his debts, it may farther be mentioned, that, except where the personalty is exempted from this payment (*p*) a Court of Equity takes to satisfy either specialty or simple contract debts, first, the personal estate, which is not bequeathed in specific legacies: (*q*) afterwards, the specific legacies: (*r*) and, lastly, the testator's widow's paraphernalia: (*s*) And to pay debts by specialty, in which the testator's heirs are bound, a Court of Equity takes, first, the personal estate which is not specifically bequeathed: (*t*) and, afterwards, freehold land descended, and before either paraphernalia, (*u*) or specific legacies: (*v*) [*382] And to pay the like debts, freehold land *beneficially devised is taken before paraphernalia: (*w*) But it appears that specific legacies, and freehold land beneficially and specifically (*x*) devised, are, to satisfy those debts, made to contribute rateably, according to their respective values: (*y*) except the land devised is by the will charged with

(*j*) *Wride v. Clarke, and Davies v. Topp*, above.

(*k*) 3 Ves. 552; 8 Ves. 304.

(*l*) *Williams v. Chitty*, above.

(*m*) See 1 Bro. C. C. 527, and 8 Ves. 124, 125.

(*n*) 1 Bro. C. C. 527; 2 Bro. C. C. 263; 3 Ves. 117, 118; 8 Ves. 124, 125.

(*o*) See 1 Bro. C. C. 527, and 8 Ves. 124, 125.

(*p*) 1 Bro. C. C. 527; 2 Bro. C. C. 263; 3 Ves. 117. On Exemption, see also in the present Treatise, Chapter III., Sect. V., and Chapter IV., Sect. V.

(*q*) 2 Atk. 625; 2 Bro. C. C. 263; 3 Ves. 117; 1 Dick. 385; 8 Ves. 124.

(*r*) *Nicholas v. Southwell*, Mos. 177; *Duke of Devon v. Atkins*, 2 P. W. 381; *Cotterell v. Chamberlain*, Bunb. 32; *Parrott v. Worsfold*, 1 Jac. & W. 594.—2 Sch. & Lef. 544.

(*s*) *Nicholas v. Southwell*, Mos. 177.—1 P. W. 730.

(*t*) 2 Atk. 624, 625; 1 Bro. C. C. 525, 526.

(*u*) *Tipping v. Tipping*, 1 P. W. 729.—8 Ves. 397.

(*v*) *Chaplin v. Chaplin*, 3 P. W. 365, 367; *Bainton v. Ward*, 2 Atk. ed. Sand. 172, and n. (2), also stated 2 Ves. 2, and from Reg. B. 7 Ves. 503, n.; *Davies v. Topp*, 1 Bro. C. C. 524.—2 Sch. & Lef. 544.

(*w*) 8 Ves. 397. See also *Nicholas v. Southwell*, Mos. 177, and *Bingham v. Erneley*, 2 Eq. Cas. Abr. 250, in marg.

(*x*) That every devise of land, or real estate, and whether made "in particular or general terms," or "in form residuary," is specific, "from this circumstance, that a man can devise only what he has at the time of devising," see 1 P. W. 679; 3 P. W. 324; Amb. 173; 7 Ves. 147, 8 Ves. 305; 10 Ves. 605; 1 Ves. & B. 175; and 1 Y. & Jerv. 310, 311.

(*y*) *Long v. Short*, 1 P. W. 403, and 5th ed. n. (1); *Short v. Long*, 8 C., 2 Vern. 756; *Silk v. Prime*, 1 Dick. 384, 1 Bro. C. C. 138, n.; *Oneal v. Mead*, 1 P. W. 693. See *Haslewood v. Pope*, 3 P. W. 324, 5th point; and *Warner v. Hayes*, 4 Vin. Abr. 468, 8

the payment of debts, in which case, it would seem, although the charge is general only, the land devised is taken before the specific legacies. (z)

In *Choat v. Yeats*, S. M., by her will, gave legacies of different sums of stock, and other legacies, amongst which was one of 30*l.*, which she directed to be paid out of her funded property. And she gave all the rest, residue, and remainder, of her funded property, after payment of her debts, legacies, funeral, and testamentary expenses, to the plaintiff, for his own use. All the rest, residue, and remainder, of her real and personal estate, she gave to trustees, upon certain trusts. On this will, Sir T. Plumer decided, that if the stock should be insufficient to pay the debts and legacies, the creditors and legatees would have a right to resort to the other personal estate; but that, as between those two funds, the stock must be first applied. (a) In *Browne v. Groombridge*, H. H. B., by his will, gave to his executors a specific fund, consisting of exchequer bills, money at his bankers, money due on policies of life insurance, money in the public funds, and debts owing to him, upon trust, among other purposes, to pay his debts, funeral and testamentary expenses, and also certain legacies; and he gave and bequeathed all the rest [*383] and residue of his estate and effects to his wife. Sir J. Leach (b) decided, that the debts and legacies were not to be paid in the first instance out of the residuary estate, and that the specific fund was first liable to pay them; his Honor holding, "that, by the clear expressions of the will, the debts and legacies were immediately charged upon that part of the personal estate, which was comprised in the specific gift." (b)

In an earlier case, *Holford v. Wood*, and which does not appear to have been noticed in either of the two authorities last mentioned, a person by her will gave a specified fund, consisting of leasehold premises, and certain other parts of her personal property, to her sole executor, for his own use, "subject only to the payment of the following annuities and legacies;" which, accordingly, in this place were bequeathed by the testatrix. Sir R. P. Arden decided, that the specific bequest to the executor "is not to be considered as the primary fund for the legacies and annuities, but as an auxiliary fund, in case the general personal estate is not sufficient." (c) This case appears to be materially distinguishable from *Choat v. Yeats*, and *Browne v. Groombridge*, by the circumstance, that the will in *Holford v. Wood* contains no disposition of the residue of the testatrix's personal estate; and to this instance, therefore, appear to be applicable, Lord Loughborough's words, "In the distribution of assets, the Court always applies assets, not specifically given to any one, before assets that are specifically given," an observation which his Lordship made in a case where he held, that, to pay the debts of the testator, a descended estate was liable, before an estate which was devised, and, by a general charge in the will, made liable to the payment of them. (d)

Vin. Abr. 442, 2 Eq. Cas. Abr. 493, 552 ;
Warner v. Hawes, 3 Bro. P. C. ed. Toml.
 21, 3 Ch. Rep. 206, probably S. C.

(z) 8 Ves. 124, 125. In *Davies v. Topp*,
 1 Bro. C. C. 524, where lands beneficially
 devised were, to pay debts, taken before spe-
 cific legacies, by the will the lands were, by
 a general charge, made liable to the debts,
 and the specific legacies were exempted from
 the payment of them.

(a) 1 Jac. & W. 102.

(b) 4 Madd. 495.

(c) 4 Ves. 76.

(d) *Williams v. Chitty*, 3 Ves. 552. On
 first applying a fund left undisposed of, see
 also *Attorney General v. Tomkins*, Amb. ed.
Blunt, 217, and 218, n. (5); and *Negus v.*
Coulter, 1 Dick. 326, Amb. 367, and ed.
Blunt, 368, n. (2.)

A legacy, which is most commonly called a specific, but which is more properly an individual,^(e) legacy appears to be a chattel, personal [*384] or real, possessed by a testator, either at the time *when the will is made, or at his death, and, when at his death, then also at the time of making the will, or during some intervening period; and which chattel is by the will specifically selected out of the testator's estate so possessed by him, he meaning that the very chattel thus selected shall be the subject of the gift, and not that the gift may be supplied by, indifferently, any part of his estate.^(f) It is necessary that the will contain some word or expression, that is evidence of these two characteristics of a specific legacy, namely, possession and selection;^(g) and the expression, which, perhaps, most commonly affords this evidence, is the possessive pronoun, my.^(h)

Amongst other⁽ⁱ⁾ instances of a specific legacy of a chattel, as of stock, or money in the public funds,^(j) of a debt,^(k) of money secured by [*395] mortgage,^(l) and of a term of, or leasehold *for, years,^(m) the following bequests may be chosen for examples,—“I give all my personal estate in W., except my bed and bedding, to J. S.”⁽ⁿ⁾ “I bequeath to E. B. all and singular my household goods, household furniture, jewels, plate, pictures, horses, chaise, linen, woollen, and all other moveables, in my said house and premises.”^(o) “To my eldest son, J. R., I give and bequeath unto him such part of my stock of horses, which he shall select, to be fairly valued and appraised, to the amount

(e) 1 West Cas. T. Hardw. 482; 1 Atk. 417.

(f) 1 West Cas. T. Hardw. 482, 483; 1 Atk. 417. On some advantages, and disadvantages, which attend a specific legacy, see 1 Vern. 31; 1 P. W. 540, 679, 680; 3 P. W. 385; Cas. T. Talb. 152; Prec. Ch. 401; 1 West Cas. T. Hardw. 483; 2 Ves. 624. And that a Court of Equity leans against construing a legacy to be specific, see Amb. 310; 4 Ves. 565, 572, 752; and 8 Ves. 413.

(g) 1 West Cas. T. Hardw. 479, 482; Amb. 59; 4 Ves. 573. See 1 Bro. C. C. 566, and 18 Ves. 466.

(h) 1 West Cas. T. Hardw. 476, 479, 481, 482; 1 Atk. 416; 1 Ves. 425; 2 Ves. 562, 563, 624; 2 Bro. C. C. 112; 1 Jac. & W. 602.

(i) Ellis v. Walker, Amb. 310; Walker v. Jackson, 2 Atk. 624; Pulsford v. Hunter, 3 Bro. C. C. 416; Nisbett v. Murray, 5 Ves. 149; Page v. Leapingwell, 18 Ves. 463.

(j) Ashton v. Ashton, Cas. T. Talb. 152, 3 P. W. 384, cited 1 West Cas. T. Hardw. 488, 1 Atk. 418, 1 Ves. 425, 2 Ves. 564, and 4 Bro. C. C. 348. (When, in 9 Ves. 181, Sir W. Grant said, that Ashton v. Ashton had been overruled by modern decisions, he perhaps meant merely that the case, as stated by Counsel, had been overruled, for it was incorrectly cited before him.) Avelyn v. Ward, 1 Ves. 420, 424, and Belt's Supplem. 184, 2nd ed. 195, cited 4 Bro. C. C. 347, 348, 349; Slesch v. Thorington, 2 Ves.

580, on the South Sea Annuities; Jeffreys v. Jeffreys, 3 Atk. 120; Cooper v. Martin, 1 West Cas. T. Hardw. 442; Cook v. Martyn, S. C., 2 Atk. 2; Stafford v. Horton, 1 Bro. C. C. 482; Morley v. Bird, 3 Ves. 629; Richardson v. Brown, 4 Ves. 177; Barrington v. Tristram, 6 Ves. 345; Franklin v. The Bank of England, 1 Russ. 575, 9 B. & C. 156, 4 Mann. & Ryl. 11; Evans v. Tripp, 6 Madd. 91; Fontaine v. Tyler, 9 Price, 94; Richards v. Richards, ib. 219.

(k) Lord Castleton v. Lord Fanshaw, 1 Eq. Cas. Abr. 298, cited 4 Ves. 566; Chaworth v. Beech, 4 Ves. 555; Innes v. Johnson, ib. 568; Gillaume v. Adderley, 15 Ves. 384, on the first legacy in the will. On a legacy of a debt, and some distinctions between a specific and a demonstrative legacy, see Chapter VI., Sect. XIII., of the present Treatise.

(l) Parrott v. Worsfold, 1 Jac. & W. 594.

(m) Lord Castleton v. Lord Fanshaw, 1 Eq. Cas. Abr. 298; Richards v. Richards, 9 Price, 219.

(n) Sayer v. Sayer, Prec. Ch. 392, Gilb. Eq. Rep. 87, 2 Vern. 688.

(o) Barton v. Cooke, 5 Ves. 461, 464. See also Gayre v. Gayre, 2 Vern. 538; Earl of Shaftsbury v. Countess of Shaftsbury, ib. 747; Kelly v. Powlet, Amb. 605, 1 Dick. 359; Green v. Symonds, 1 Bro. C. C. 129, n.; Land v. Devaynes, 4 Bro. C. C. 537. On a bequest of goods and chattels on board a ship, see Chapman v. Hart, 1 Ves. 271.

of 800*l.*:"(p) "I bequeath to W. B. my capital stock of 1000*l.* in the India Company's stock, with the dividend thereon arising, which dividend is to pay for his education and maintenance till he is qualified for holy orders, and then the capital to be laid out in the purchase of a living for him in the Church. This stock is to be continued or disposed of, at the discretion of my executors:"(q) "I bequeath to J. C. B. 3000*l.* stock, in the three per cent. consols bank annuities, being part of my stock now standing in my name in the Company's books, to be transferred to him by my executors hereinafter named, when he shall attain the age of twenty-one, the interest thereof in the mean time to be applied towards his education:"(r) "I bequeath the sum of 11,000*l.* capital bank stock, now standing in my name in the books of the Governor and Company of the bank of England, unto W. N. T.:"(s) "I give to A. and B. all the stock which I have in the three per cents., being about 5000*l.*, except 500*l.*, which I give to C.:"(t) "I give to J. F. 10*l.* per annum for life, to be paid out of my dividends of 400*l.* in the joint stock of South Sea annuities, *now standing in the Company's books [*386] in my name; and I do hereby charge my said annuity stock with payment thereof accordingly. And I give to J. D. my 400*l.* East India stock; and also my 400*l.* joint stock in South Sea new annuities, subject to the payment of said annuity, to M. B.:"(u)

A general legacy, and which, when it consists of a chattel personal, is often called a pecuniary(v) legacy, seems to be a chattel, personal or real, the gift of which the testator intends may be supplied by any part of his estate, capable of being the subject of the gift.(w) Several cases occur, wherein a legacy has been held to be general, and not specific.(x) In the number may be particularly mentioned the instances of,—a sum of money bequeathed, in trust to lay it out in a purchase of land:(y) a specified sum of bank annuities, directed to be purchased out of the testator's personal estate for persons named in his will:(z) stock, or money in the public funds:(a) a sum of money which a testator bequeathed out of his personal estate to A., to purchase her an annuity for her life:(b) a life annuity bequeathed out of the testator's personal estate.(c) Examples

- (p) *Richards v. Richards*, 9 Price, 219. 384; *Mann v. Copland*, 2 Madd. 223; *Wil-*
(q) *Ashburner v. Macguire*, 2 Bro. C. C. 108. *lox v. Rhodes*, 2 Russ. 452.
(r) *Barton v. Cooke*, 5 Ves. 461. (y) *Hinton v. Pinke*, 1 P. W. 539.
(s) *Norris v. Harrison*, 2 Madd. 268, 279. (z) *Gibbons v. Hills*, 1 Dick. 324.
(t) *Humphreys v. Humphreys*, 2 Cox, 184, 1 P. W. 5th ed. 306, n. (2.) (a) *Partridge v. Partridge*, Cas. T. Talb. 226, 1 Atk. 417, n., and also stated by Lord Hardwicke, 1 West Cas. T. Hardw. 484; *Bronsdon v. Winter*, Amb. 57, stated 3 Atk. 123, and cited 4 Bro. C. C. 349; *Simmons v. Vallance*, 4 Bro. C. C. 345; *Blackshaw v. Roberts*, cited ib. 349; *Richardson v. Brown*, 4 Ves. 177; *Constantine v. Constantine*, 6 Ves. 100; *Sibley v. Perry*, 7 Ves. 522; *Webster v. Hale*, 8 Ves. 410; *Deane v. Teet*, 9 Ves. 146; *Parrott v. Worsfold*, 1 Jac. & W. 594.
(u) where all the three legacies were held to be specific. (b) *Halton, or Alton, v. Medlicot*, cited 3 Atk. 694, and 2 Ves. 417.
(v) 1 Atk. 509; 1 Dick. 324; 1 Bro. C. C. 566. (c) *Hume v. Edwards*, 3 Atk. 693. See *Pearcock v. Monk*, 1 Ves. 127, 133, and *Lewin v. Lewin*, 2 Ves. 415.
(w) 2 Ves. 563.
(x) *Anon. v. Wilkinson*, 2 Ch. Cas. 25; *Lawson v. Stitch*, 1 Atk. 507, 1 West Cas. T. Hardw. 325; *Stirling v. Lydiard*, 3 Atk. 199; *Sleech v. Thorington*, 3 Ves. 560, on the bequest of the East India bonds; *Raymond v. Brodbelt*, 5 Ves. 199; *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Sadler v. Turner*, 8 Ves. 617, 624; *Lambert v. Lambert*, 11 Ves. 607; *Gillaum v. Adderley*, 15 Ves.

of a general legacy are,—“I bequeath to R. F. and his wife, the sum of 50*l.* each, *for a ring:”(d) “I give to A. S. 5000*l.* in the [*387] old annuity stock of the South Sea Company:”(e) “I give to Storey’s Hospital 3400*l.* in the three per cents., the annual dividends of which to be every half year divided betwixt four widows:”(f) “I give to F. K. K. a legacy of 1000*l.* out of my reduced bank annuities three per cents. by my executor within one month from my decease:”(g) “I give to T. W. and W. W. 200*l.* four per cent. consolidated bank annuities.”(h)

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*CHAPTER XXXI.

OF TACKING TO A MORTGAGE.

SECT. I. *Of the Principle of Tacking.*II. *Of the Tacking of Costs, or Expenses.*III. *Of the Tacking of a Bond Debt.*IV. *Of the Tacking of a Simple Contract Debt.*V. *Of the Extension of the Principle to compel—1. A Redemption of a different Mortgage of different Land; and 2. A Redemption of the whole of one Mortgage.*

SECTION I.

OF THE PRINCIPLE OF TACKING.

WHEN land is mortgaged, on condition of redemption by payment, at a certain day, of principal and interest; while the condition is neither fulfilled nor broken, the mortgagee is seised or possessed of an estate in the land, liable to be defeated by the performance of the condition.(a) But so soon as the condition is broken, at law that estate is forfeited to the mortgagee. In equity, however, it is still considered to be a pledge only, which, under certain restrictions, may, notwithstanding the forfeiture, be redeemed.(b) But although, in general cases, a Court of Equity allows the pledge to be redeemed on payment of principal and interest, yet where, in the opinion of the Court, the mortgagee has against the mortgagor an equity to be, at the time of redemption, satisfied a farther claim against him, the Court will *not take from the mortgagee [*389] his legal right to the estate forfeited, except upon terms considered by the Court to be an equitable arrangement between the par-

(d) *Apreece v. Apreece*, 1 Ves. & B. 364.(e) *Purse v. Snablin*, or *Snablin*, 1 West Cas. T. Hardw. 470, 1 Atk. 414, cited, as *Pierce v. Snaveling*, in 1 Ves. 425.(f) *Bishop of Peterborough v. Mortlock*, 1 Bro. C. C. 565.(g) *Kirby v. Potter*, 4 Ves. 748. See also *Deane v. Test*, 9 Ves. 146.(h) *Wilson v. Brownsmith*, 9 Ves. 180.

(a) 15 Vin. Abr. 440, pl. 7.

(b) 2 Eden Rep. 79, 80; 2 Ves. jun. 377.

ties.(c) The rule adopted is, "He, that will have equity to help where the law cannot, shall do equity to the same party against whom he seeks to be relieved in equity."(d) The legal right, and that equity against the mortgagor, constitute the principle of tacking: want of that equity will prevent tacking.(e)

SECTION II.

OF THE TACKING OF COSTS, OR EXPENSES.

A MORTGAGEE has not universally, but generally, and except under particular circumstances,(f) an equity to claim out of the mortgaged estate payment of all his costs, or expenses, to which he has been put in consequence of the mortgage. And therefore on redemption, he is, generally speaking, entitled to be paid those costs, or expenses;(g) as,—costs "in defending his mortgage at law:"(h) "expenses in law-suits to foreclose the mortgagor, and otherwise the relation to the estate:"(i) fines paid on the renewal of a church lease mortgaged:(j) money expended "in supporting the right of the mortgagor to the estate, where his title has been impeached:"(k) in some circumstances, *money paid to a bailiff, or receiver, to receive the rents of the estate:(l) [*390] and, in some circumstances, money paid to a bailiff, to manage the estate.(m)

The general language of a Court of Equity is,—“At law, after a mortgage is forfeited, the estate is the absolute property of the mortgagee, and he may deal with it as his own; and if the mortgagor comes the redemption, which the equity of this Court gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts.”(n)

SECTION III.

OF THE TACKING OF A BOND DEBT.

WHEN a mortgage is made by a person seised in fee, and the mortgagor is farther indebted to the mortgagee by bond, entered into before

(c) *Rayson, or Rauson, v. Sacheverell*, 1 Vern. 41, 2 Ch. Cas. 98; *Saint John v. Holford*, 1 Ch. Cas. 97; *Demandray, or Demainbray, v. Metcalf*, Prec. Ch. 419, 2 Vern. 691, 698; *Jones v. Smith*, 2 Ves. jun. 377; *Wetherell v. Collins*, 3 Madd. 255.

(d) 1 Ch. Cas. 97; Prec. Ch. 420; 2 Eden, 80.

(e) *Bromley v. Hamond*, 2 Ch. Cas. 23.

(f) *Mocatta v. Murgatroyd*, 1 P. W. 398; *Gilbert v. Golding*, 2 Anstr. 442; *Skipp v. Wyatt*, 1 Cox, 353; *Detellin v. Gale*, 7 Ves. 583; Ex parte *Harris*, cited in Ex parte *Trew*, 3 Madd. 372; *Barry v. Wray*, 3 Russ. 465; *Archdeacon v. Bowes*, M'Clel. 149; *Morony v. O'Dea*, 1 Ball & B. 109, 121.

(g) *Hunt v. Fownes*, 9 Ves. 70; Ex parte *Brightens*, 1 Swanst. 3; *Ellison v. Wright*, 3 Russ. 458; *Wilson v. Metcalfe*, 3 Madd. 45; *Wetherell v. Collins*, ib. 255; Ex parte *Trew*, ib. 372; *Loftus v. Swift*, 2 Sch. & Lef. 642, 657; *Webb v. Rorka*, ib. 661, 676.

(h) *Ramsden v. Langley*, 2 Vern. 536.

(i) *Lomax v. Hide*, 2 Vern. 185.

(j) *Manlove v. Bale*, 2 Vern. 84; *Lucam v. Mertins*, 1 Wils. 34.

(k) *Godfrey v. Watson*, 3 Atk. 518.

(l) *Godfrey v. Watson*, 3 Atk. 518; *Davis v. Dendy*, 3 Madd. 170; *Carew v. Johnston*, 2 Sch. & Lef. 301.

(m) *Bonithon v. Hockmors*, 1 Vern. 316.

(n) *Wetherell v. Collins*, 3 Madd. 255.

or after the mortgage, (o) here, on payment of the mortgage debt only, and without the bond debt, a Court of Equity allows a redemption by—the mortgagor himself: (p) by a purchaser for a valuable consideration of the equity of redemption: (q) by a mortgagee of the equity of redemption: (r) and by the assignees of the mortgagor, become bankrupt: (s) and, after the death of the mortgagor,—by one, who, for a valuable consideration, has purchased the equity of redemption from the *heir [*391] at law of the mortgagor: (t) by the mortgagor's specialty creditors: (u) by “intervening incumbrancers of a superior nature between the mortgage and the bond:” (v) by creditors “claiming under a deed of trust by the mortgagor in his life-time conveying the equity of redemption:” (w) by the mortgagor's creditors, the equity of redemption being devised by him, in trust for the payment of his debts: (x) by, it seems, the mortgagor's creditors, the equity of redemption being by his will charged with the payment of his debts: (y) and by trustees, to whom the mortgagor's heir at law has conveyed the equity of redemption, “in trust for payment of all the bond and simple contract debts of his father equally.” (z)

When a mortgage is made by a termor for years, and the mortgagor is farther indebted by bond to the mortgagee, here, also, on payment, of the mortgage debt only, and without the bond, a Court of Equity, after the death of the mortgagor, allows a redemption by a person to whom the executor of the mortgagor has assigned the equity of redemption. (a)

When a mortgage is made by a person seised in fee, and the mortgagor is farther indebted to the mortgagee by bond, in which his heirs are bound; without payment of the bond, as well as the mortgage, a Court of Equity does not allow a redemption by the mortgagor's heir at law; (b) or devisee of equity of redemption, if the devise is merely for the devisee's own benefit, and is therefore, as against the bond creditor, void [*392] under the *statute 3 and 4 W. and M. c. 14, against fraudulent devises. (c) The principles on which the heir is not al-

(o) *Windham v. Jennings*, 2 Ch. Rep. 247; *Troughton v. Troughton*, 1 Ves. 86.

(p) *Monger v. Kett*, 12 Mod. 559; *Challis v. Casborn*, Prec. Ch. 407, 1 Eq. Cas. Abr. 325; *Shrapnell v. Blake*, 2 Eq. Cas. Abr. 603, Ca. 84; *Morret v. Paske*, 2 Atk. 53; *Jones v. Smith*, 2 Ves. jun. 376. Formerly the mortgagor himself was not allowed to redeem, without payment of the bond as well as the mortgage; *Baxter v. Manning*, 1 Vern. 244; *Anon.* 3 Salk. 84; *Gory's case*, S. C., ib. 240; *Peers v. Baldwyn*, 2 Eq. Cas. Abr. 611. See also *Halliley v. Kirtland*, 2 Ch. Rep. 360.

(q) *Troughton v. Troughton*, 1 Ves. 87, 3 Atk. 659; *Archer v. Snatt*, 2 Stra. 1107; *Adams v. Claxton*, 6 Ves. 226, 329.

(r) *Anon.* 3 Salk. 84; *Gory's case*, S. C., ib. 240; *Shrapnell v. Blake*, 2 Eq. Cas. Abr. 603, 1 West Cas. T. Hardw. 166.

(s) *Shrapnell v. Blake*, above.

(t) *Bayly v. Robson*, or *Robinson*, Prec. Ch. 89, 1 Eq. Cas. Abr. 325, Ca. 9, n. (b.) See also *Coleman v. Winch*, 1 P. W. 775, Prec. Ch. 511.

(u) *Lowthian v. Hassel*, 3 Bro. C. C. 162; *Hamerton v. Rogers*, 1 Ves. jun. 513. See also *Anon.*, or *Jackson v. Langford*, 2 Ves. 662, and *Jones v. Smith*, 2 Ves. jun. 376.

(v) *Powis v. Corbet*, 3 Atk. 556.

(w) *Anon.*, or *Jackson v. Langford*, 2 Ves. 662.

(x) *Heams v. Bance*, 3 Atk. 630. See also *Powis v. Corbet*, ib. 556.

(y) *Price v. Fastnedge*, Amb. 685.

(z) *Coleman v. Winch*, or *Wince*, 1 P. W. 775, Prec. Ch. 511.

(a) *Coleman v. Winch*, 1 P. W. 775, Prec. Ch. 512. See also *Vanderzee v. Willis*, 3 Bro. C. C. 21.

(b) *Windham v. Jennings*, 2 Ch. Rep. 247; *Anon.* 2 Ch. Cas. 164; *Shuttleworth v. Laycock*, 1 Vern. 245; *Challis v. Casborn*, Prec. Ch. 407; *Shrapnell v. Blake*, 2 Eq. Cas. Abr. 603; *Troughton v. Troughton*, 1 Ves. 86, 3 Atk. 659; *Powis v. Corbet*, 3 Atk. 556; *Heams v. Bance*, ib. 630.

(c) *Challis v. Casborn*, Prec. Ch. 407; *Heams v. Bance*, 3 Atk. 630; *Price v. Fastnedge*, Amb. 685. See also 3 Atk. 659.

lowed to redeem, without payment of the bond, seem to be,—that the mortgaged land, so soon as redeemed by the heir, would be assets in his hands to pay the bond debt; that the creditor might sue to be paid out of this particular fund; and that therefore a circuitry of action or suit is avoided, by obliging the heir to pay the bond at the time of redemption.(d) The same principles appear to apply to a devisee of the equity of redemption, if, as against creditors, the devise to him is void under the statute 3 and 4 W. and M. c. 14, against fraudulent devises,(e) or the late Act 11 Geo. IV. and 1 Will. IV. c. 47.

An heir at law has been allowed to redeem a mortgage of copyholds, without payment of a judgment, that had been assigned to the mortgagee. The reason given was, that copyhold lands are not liable to an execution upon a judgment.(f)

When a mortgage is made by a termor for years, and the mortgagor is also indebted to the mortgagee by bond, without payment of the bond, as well as the mortgage, a Court of Equity does not allow a redemption by the mortgagor's executor.(g)

It remains to mention two cases, where the mortgagee was, in different rights, creditor by mortgage and bond. In *Blackwell v. Symes*, "a woman, bond creditor, married mortgagee, and died. The husband took out administration to his wife, and, on bill brought by him, was allowed to tack the bond to the mortgage, against the heir at law."(h) In *Price v. Fastnedge*, E. F., seised in fee, mortgaged to R. P. for years, to secure 1000*l.* R. P. devised his real and personal estate to S., and made her executrix. *S. afterwards lent E. F. 500*l.*, upon bond. [*393] E. F. by his will charged the mortgaged lands with the payment of his debts. On a bill by S. to be paid the money due on mortgage, and on the bond, Sir T. Sewell decided that, because the equity of redemption was by the will of E. F. charged with the payment of his debts, the bond debt could not be tacked to the mortgage.(i)

SECTION IV.

OF THE TACKING OF A SIMPLE CONTRACT DEBT.

LAND, or leaseholds for years, conveyed in mortgage, may, it is certain, be, by a written agreement, charged with the payment of a simple contract debt due by the mortgagor to the mortgagee; and then the mortgagor will not be allowed to redeem, without payment of that money, as well as the original mortgage debt.(j) But, without that agreement, a mortgagee of land has not, in the consideration of a Court of Equity,

(d) 1 Ves. 87; 2 Ves. 662; 2 Atk. 53; 3 Atk. 556, 630, 659; 3 Bro. C. C. 163; 2 Eq. Cas. Abr. 603; 1 West Cas. T. Hardw. 167.

(e) Prec. Ch. 407; 3 Atk. 659; Amb. 686.

(f) Heir of Cannon v. Pack, 6 Vin. Abr. 222, 2 Eq. Cas. Abr. 226.

(g) Anon. 2 Vern. 177; Eccles v. Tha-

will, probably S. C., Prec. Ch. 18; Coleman v. Winch, 1 P. W. 776, Prec. Ch. 512. See also Halliley v. Kirtland, 2 Ch. Rep. 360, where, perhaps, Halliley was executor of Pack, the mortgagor.

(h) Cited Amb. 686.

(i) Amb. 685.

(j) See Gordon v. Graham, 7 Vin. Abr. 52, 2 Eq. Cas. Abr. 598.

an equity against the mortgagor, to stand on his legal title and resist redemption until payment, beyond the mortgage debt, of a simple contract debt due to him from the mortgagor; and, accordingly, the mortgagor may redeem on payment of the mortgage debt only.^(k) And he is also entitled to redeem without payment of the simple contract debt, if the mortgage is of leaseholds for years.^(l) Also, on a mortgage of leaseholds for years, it appears that, after the death of the mortgagor, on paying the mortgage debt only, redemption may be made by a specialty creditor;^(m) by trustees, to whom the mortgagor in his life-time assigned the equity of redemption, in trust for the benefit of his creditors;⁽ⁿ⁾ and by creditors, where a bill has been filed by them against the mortgagor's executor and heir at law, and a decree obtained for the [*394] *creditors to come in.^(o) But it seems that the executor of the mortgagor cannot redeem, without payment of the simple contract debts due from his testator to the mortgagee.^(p)

SECTION V.

OF THE EXTENSION OF THE PRINCIPLE OF TACKING, TO COMPEL, 1, A REDEMPTION OF A DIFFERENT MORTGAGE OF DIFFERENT LAND; AND 2, A REDEMPTION OF THE WHOLE OF ONE MORTGAGE.

1. If, by two different mortgages, A. mortgages two different estates to B.; except on the terms to pay off both mortgages, it appears a Court of Equity will not decree a redemption, either by A. himself,^(q) or, if A. becomes bankrupt, by the assignees under the commission.^(r) The reason is stronger, where one of the mortgages is defective. And therefore where a person is a mortgagee, by two different mortgages of different land, and one of them is a defective security, as where the debt is greater than the value of the land,^(s) here, except on the terms to pay off the defective security as well as the other, the Court will not allow the latter to be redeemed by the mortgagor himself,^(t) or by his heir at law,^(u) or, if the mortgagor becomes bankrupt, by the assignees under the commission.^(v)

If, by two different mortgages, A. mortgages two different estates to B., and, after both these mortgages, A. mortgages or sells one of the estates to C., here, on a bill to redeem, or a bill to foreclose,^(w) the Court

(k) *Newby v. Cooper*, Cas. T. Finch, 379; *Monger v. Kett*, 12 Mod. 559.

(l) *Ex parte Hooper*, 1 Mer. 7, 19 Ves. 477.

(m) *Coleman v. Winch*, 1 P. W. 777; *Vanderzee v. Willis*, 3 Bro. C. C. 21.

(n) *Adams v. Claxton*, 6 Ves. 226.

(o) *Vanderzee v. Willis*, 3 Bro. C. C. 21, cited 6 Ves. 229.

(p) *Coleman v. Winch*, 1 P. W. 776; *Eccles v. Thawill*, Prec. Ch. 18; *Demandray v. Metcalf*, Prec. Ch. 419, 421, cited 2 Ves. jun. 378. See also *Vanderzee v. Willis*, 3 Bro. C. C. 21, cited 6 Ves. 229.

(q) *Willie v. Lugg*, 2 Eden, 80; *Jones v. Smith*, 2 Ves. jun. 376, 377, 379.

(r) *Roe v. Soley*, 2 W. Bl. 726; *Jones v. Smith*, 2 Ves. jun. 377; *Tribourg v. Lord Pomfret*, Amb. ed. Blunt, 733, n. 2.

(s) 1 Vern. 29; 2 Vern. 207, 286; 2 Ves. jun. 377.

(t) Dictum of counsel in *Purefoy v. Purefoy*, 1 Vern. 29, cited 2 Ves. jun. 376; *Jones v. Smith*, 2 Ves. jun. 377.

(u) *Shuttleworth v. Laycock*, 1 Vern. 245; *Margrave v. Le Hook*, 2 Vern. 207.

(v) *Pope v. Onslow*, 2 Vern. 286, cited 2 Ves. jun. 376, and 1 Atk. 300.

(w) *Tribourg v. Lord Pomfret*, cited Amb. 733.

will not allow C. to redeem B., except he *will pay off both mortgages;(x) and although C. purchased, or became mortgagee, without notice of the mortgage on the other estate.(y) [*395]

2. It may here farther be noticed, that, in the case of *one* mortgage, the mortgagee is entitled to be redeemed entire, and not by parcels. And, therefore, if A. mortgages one estate to B., and afterwards a part of it to C., C. cannot redeem that part only.(z) And a creditor by judgment cannot redeem a moiety only, but must redeem the whole or none.(a) And for this reason, if a judgment creditor redeems a mortgage, the heir at law of the mortgagor cannot redeem him, without payment of both mortgage and judgment.(b)

If A. makes one mortgage to B. of two estates, and afterwards mortgages one of them to C., and after that the other to D., C. or D. cannot redeem the estate mortgaged to himself, without also redeeming B.'s mortgage on the other estate.(c) And if C. redeems B., it appears D. cannot redeem C., without paying off both C.'s original mortgage, and the money paid by C. to redeem B.(d)

If A. makes one mortgage to B. of two estates, D. F. and E. D., and afterwards settles D. F. on G., and afterwards, on a sale of part of D. F., settles E. D.(e) on G., G. cannot redeem E. D. only.(f)

*CHAPTER XXXII.

[*396]

OF THE PRIORITY OF SUCCESSIVE INCUMBRANCERS OF THE SAME LAND.

To successive incumbrancers of the same land applies the rule, *Qui prior est tempore potior est jure*; a rule to which, however, a Court of Equity allows many exceptions, grounded on the principle, that when one incumbrancer is armed with an equity only, and another with an equal equity and also the law, the Court will leave the parties to combat at law, and will not take from the latter incumbrancer any advantage, which the law may give him.(a)

From this principle, and the rule mentioned, depends the law of priority of successive incumbrancers of the same land.

To a mortgagee of the legal estate applies also, it will be seen, the principle of tacking.

(x) *Tribourg v. Lord Pomfret*, cited Amb. 733, and stated from Reg. B. Amb. ed. Blunt, 733, n.; *Ex parte Carter*, Amb. 733; *Cator v. Charlton*, and *Collet v. Munden*, cited 2 Ves. jun. 377; *Ireson v. Denn*, 2 Cox, 425.

(y) *Ireson v. Denn*, 2 Cox, 425.

(z) *Titley v. Davis*, 15 Vin. Abr. 447, pl. 19, 2 Eq. Cas. Abr. 604, pl. 35; *Sish v. Hopkins*, Amb. ed. Blunt, Append. 793.

(a) *Sish v. Hopkins*, above; *Stileman v. Ashdown*, Amb. ed. Blunt, 16, and n. 6.

(b) *Stileman v. Ashdown*, above.

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(c) *Titley v. Davis*, above, and cited Amb. 733; *Sish v. Hopkins*, above.

(d) *Titley v. Davis*, 15 Vin. Abr. 447, pl. 20, 2 Eq. Cas. Abr. 604, pl. 36.

(e) In the report it is *West Dales*, and not *East Dales*, that is settled. But from the context this seems to be a mistake.

(f) *Willie v. Lugg*, 2 Eden, 78.

(a) *Hardr.* 318; 2 *Ventr.* 338; 2 *P. W.* 491, 495; 2 *Ves.* 486; 1 *Durn. & E.* 767, 768.

- SECT. I. *Of the Rule, Qui prior est tempore potior est jure.*
 II. *Of the Principle, on which the Exceptions to that Rule are grounded.*
 III. *Of several of the Exceptions themselves.*
 IV. *Of certain Cases, in which an Incumbrancer, although he has the Law on his side, may not have an equal Equity.*
 V. *Of other Cases, in which an Incumbrancer, although he has the Law on his side, may not have any Equity.*
 VI. *Of two Cases, where a Mortgagee of the Legal Estate may not come within the principle of Tacking, and where, in consequence, a subsequent Incumbrance acquired by him may not be entitled to Priority before an Intervening Incumbrance.*

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*SECTION I.

OF THE RULE, QUI PRIOR EST TEMPORE POTIOR EST JURE.

THE rule, *Qui prior est tempore potior est jure*, applied to successive incumbrancers of the same land, is applicable to the three cases,—1. When the first incumbrancer is a mortgagee, or creditor by statute, judgment, or recognizance, seised or possessed of the legal estate: 2. When one of several incumbrancers has the better right to call for the legal estate: 3. When, of several incumbrancers, no one has the better right to call for the legal estate.

In the first case, the order of payment is, first, to the mortgagee, or creditor, seised or possessed of the legal estate; and afterwards to the other incumbrancers by mortgage, statute, judgment, and recognizance, in the order in which, in time, their incumbrances stand. (b)

In the second case, the order of payment is, first to the incumbrancer who has the better right to call for the legal estate; and afterwards to the other incumbrancers by mortgage, statute, judgment, and recognizance, in the order in which, in time, their incumbrances stand. (c)

In the third case, the only order of payment is, to all the incumbrancers by mortgage, statute, judgment, and recognizance, in the order in which, in time, their incumbrances stand. (d)

[*398] *The rule mentioned applies, it may here be noticed, to a fourth case;—where the first incumbrancer is a judgment creditor, who is also a mortgagee later than another judgment creditor intervening between the first judgment and the mortgage. In a case of

(b) *Turner v. Richmond*, 2 Vern. 81; *Earl of Bristol v. Hungerford*, ib. 524; *Symmes v. Symonds*, 4 Bro. P. C. ed. Toml. 328; *Brace v. Duchess of Marlborough*, 2 P. W. 495, seventh point; *Barnett v. Weston*, 12 Ves. 130; *Baker v. Harris*, 16 Ves. 397.

(c) *Earl of Pomfret v. Lord Windsor*, 2 Ves. 472, 486; *Willoughby v. Willoughby*, 1 Durn. & E. 763, 768, 773. See also

Clarke v. Abbot, Barn. Ch. Rep. 457, 2 Eq. Cas. Abr. 606, Ca. 41.

(d) *Brace v. Duchess of Marlborough*, 2 P. W. 495, seventh point; *Charlton v. Low*, 3 P. W. 328; *Earl of Pomfret v. Lord Windsor*, 2 Ves. 486; *Willoughby*, 1 Durn. & E. 773, 774, 2 Ves. 684; *Beckett v. Cordley*, 1 Bro. C. C. 353, 358; *Frere v. Moore*, 8 Price, 475.

this kind, where the mortgage was taken, without notice of the second judgment, and the second judgment creditor filed a bill, praying a sale of the estate, Lord Hardwicke refused to decree a sale, unless the plaintiff consented to pay off, before his own judgment, both the first judgment and the mortgage. If he did not submit to these terms, he was left to take his remedy at law, by extending the estate.(e)

SECTION II.

OF THE PRINCIPLE, ON WHICH THE EXCEPTIONS TO THE RULE OF PRIORITY ARE GROUNDED.

To the rule, *Qui prior est tempore potior est jure*, applied to successive incumbrancers of the same land, a Court of Equity allows many exceptions; grounded on the principle, that where one incumbrancer is armed with an equity only, and another with an equal equity, and also the law, the Court will leave the parties to combat at law, and will not take from the latter incumbrancer any advantage, which the law may give him.(f)

This principle, applied to particular cases, will be exemplified by the several exceptions themselves, which it is intended to notice in the third section of this Chapter; and by the cases, afterwards to be considered, in which an incumbrancer, although he has the law on his side, may not have an equal, or any equity. It may, therefore, be proper to make in this place some general observations only. The principle mentioned has the effect to give to a later incumbrance a priority before one, that, in order of *time, stands before that incumbrance. But to come [*399] within such principle, either the creditor himself, or a trustee for him, must be seised or possessed of the legal estate,(g) or have the best right to call for the legal estate;(h) which estate here meant is, not a legal estate as distinguished from one that is equitable, but the estate which, at law, is in the seisin or possession of a *tenant*, that is, one who at law, is entitled to the present possession of the land, and who may, if necessary, now obtain that possession by ejectment;(i) or one who at law is entitled to receive from a tenant of the land a present yearly rent, or other service, for it.(j) The former kind of tenant may be a person entitled to the present possession of land, extended(k) under

(e) *Smithson v. Thompson*, 1 Atk. 520.

(f) *Hardr.* 318; 2 Vent. 338; 2 P. W. 491, 495; 2 Ves. 486; 1 Durn. & E. 767, 768.

(g) *Marsh v. Lee*, 2 Vent. 337; *Brace v. Duchess of Marlborough*, 2 P. W. 495, seventh point; *Clarke v. Abbot*, Barn. Ch. Rep. 457, 461, 462, 2 Eq. Cas. Abr. 606, Ca. 41.

(h) *Wilkes v. Boddington*, 2 Vern. 599; *Earl of Pomfret v. Lord Windsor*, 2 Ves.

486; *Willoughby v. Willoughby*, 1 Durn. & E. 763, 768, 773.

(i) *Willoughby v. Willoughby*, 1 Durn. & E. 767; *Goodtitle v. Morgan*, ib. 755; *Doe v. Wharton*, 8 Durn. & E. 2.

(j) *Dighton v. Greenvil*, 2 Vent. 328; *Cambell's case*, 1 Rol. Abr. 894; *Harrington v. Garroway*, 2 Rol. Abr. 472.

(k) See much learning on the nature of tenancy under an extent, in *Dighton v. Greenvil*, 2 Vent. 321.

a statute,(*l*) judgment,(*m*) or recognizance;(n) or entitled to the present possession, under a conveyance or assignment from a first mortgagee;(o) and such tenant is, it is well known, very often a person possessed of a satisfied term of years.(p) And the latter kind of tenant mentioned, or one who at law is entitled to receive from a tenant a present yearly rent, or other service, may be a tenant of land extended on a statute or judgment, and now in the possession of a tenant entitled to the present possession of it.(q)

To come within the same principle, it is also essential that the creditor, who claims the priority, had not, at the time when he advanced his [*400] money, notice of the earlier incumbrance. If he *had not then notice, he is allowed to gain priority by afterwards acquiring the legal estate, although with notice of the former incumbrance.(r) And this acquisition may be made even *pendente lite*, that is, pending a suit in equity, the end of which is to redeem a mortgage, or to pay creditors, or to settle their priorities. But here a distinction is to be noticed. The legal estate is allowed to be got in at any time before a decree made to pay creditors, or to settle their priorities; and accordingly if obtained before that decree, such legal estate may confer a priority;(s) but the acquiring of the legal estate, after such decree made, is not permitted to give any priority to the creditor, who has so afterwards obtained that estate.(t)

It remains to be observed, that, to come within the principle which has been mentioned, the creditor must have taken his security clearly *bond fide*;(u) and must have not only the law on his side, but also an equal(v) equity.(w)

A mortgagee is a purchaser *pro tanto*;(x) or to the extent of his claim against the property pledged to him. The law, therefore, which, on the protection afforded by the legal estate, applies to a purchaser, extends also to a mortgagee. He who purchases land *bond fide*, for a valuable consideration, and without notice of a former purchase of, or incumbrance on it, and is either himself, or by a trustee for him, seised or possessed of the *legal estate, that is, the estate of a tenant of the [*401] land, or one who at law is entitled to the present possession,

(l) Hedworth v. Primate, Hardr. 318; Stanton v. Sadler, 2 Vern. 30.

(m) Higgon v. Syddal, 1 Ch. Cas. 149.

(n) Hackett v. Wakefield, Hardr. 172.

(o) Marsh v. Lee, 2 Ventr. 337; Cockes v. Sherman, 2 Freem. 13.

(p) Willoughby v. Willoughby, 1 Durn. & E. 767; Goodtitle v. Morgan, ib. 755.

(q) Bro. Abr. tit. Stat. Merch. pl. 44; 1 Rol. Abr. 894, B. pl. 5; 2 Rol. Abr. 472, P. pl. 11; 2 Vent. 328.

(r) Marsh v. Lee, 2 Ventr. 337; Cockes v. Sherman, 2 Freem. 14; Brace v. Duchess of Marlborough, 2 P. W. 495, sixth point; Wortley v. Birkhead, 2 Ves. 574; Matthews v. Cartwright, 2 Atk. 347; Belchier v. Butler, 1 Eden, 529, 530.

(s) March v. Lee, 1 Ch. Cas. 162, 2 Ventr. 337; Hawkins v. Taylor, 2 Vern. 29; Brace v. Duchess of Marlborough, 2 P. W. 491, first point; Wortley v. Birkhead, 2

Ves. 574; Belchier v. Butler, or Renforth, 1 Eden, 523, 5 Bro. P. C. ed. Toml. 292; Robinson v. Davison, 1 Bro. C. C. 63; *Ex parte* Knott, 11 Ves. 719. These cases seem to verify the proverb, "One shall beat the bush, and another have the bird." Plowd. 57.

(t) Earl of Bristol v. Hungerford, 2 Vern. 525; Wortley v. Birkhead, 2 Ves. 574; *Ex parte* Knott, 11 Ves. 619; Sumner v. Kelly, 2 Sch. & Lef. 398.

(u) Cockes v. Sherman, 2 Freem. 13; Willoughby v. Willoughby, 1 Durn. & E. 767, 768, 774, 775.

(v) *Melior est conditio possidentis*, 2 Inst. 391. *In equali jure, melior est conditio possidentis*, 2 Fonbl. Treat. Eq. 5th ed. 302.

(w) Hedworth v. Primate, Hardr. 318; Marsh v. Lee, 2 Ventr. 337; Hagshaw v. Yates, 1 Stra. 240.

(x) 2 P. W. 491; 2 Ves. 684; 1 Durn. & E. 767, 770; 5 Ves. 134.

and who may, if necessary, now obtain that possession by ejectment,(y) or one who at law is entitled to receive from a tenant of the land a present yearly rent, or other service, for it,(z) seems to be, through that legal estate, and while in possession of and entitled to it, fully protected at law against every former purchase of, or incumbrance on, the property so bought by him. And because he is a purchaser, *bond fide*, and for a valuable consideration, if also he had not before, or at the time when, he paid his money, and the vendor executed the conveyance to him,(a) notice of such former purchase or incumbrance, and so he has the law on his side, and also an equal equity, a Court of Equity will not disturb his security at law,(b) and in particular, it may be mentioned, will not oblige him to deliver up his title deeds, or discover his title.(c) A purchaser *bond fide*, for a valuable consideration, and without notice, is so much favoured in equity, that cases are found in which the Court has refused to oblige him to deliver up deeds, or discover his title, although he got possession of the deeds for a reward, or by trick, or other undue means;(d) as in "the instance of a man, who "got a ladder, and fetched [*402] a deed out of a window."(e) The language of the reports is, "that where a purchaser has got a deed into his hands, "whether he doth it by power or otherwise, if he had no notice of it, when he made the purchase, he shall not be bound to discover it;" and that a purchaser, "having honestly paid his money without notice, may use what means he can to fortify his title."(f)

The legal estate held under a statute may protect a purchaser against a statute,(g) or judgment,(h) or mortgage,(i) or settlement for valuable consideration;(j) held under a mortgage may protect him against a judgment;(k) held under an assignment of a term of years mortgaged may protect him against a second mortgage of the term;(l) and held under

(y) Willoughby v. Willoughby, 1 Durn. & E. 767; Goodtitle v. Morgan, ib. 755; Doe v. Wharton, 8 Durn. & E. 2.

(z) Dighton v. Greenvil, 2 Ventr. 328; Cambell's case, 1 Rol. Abr. 894; Harrington v. Garraway, 2 Rol. Abr. 472.

(a) More v. Mayhow, 1 Ch. Cas. 34, 2 Freem. 175; Meynell v. Garraway, Nels. 63; Jones v. Stanley, 2 Eq. Cas. Abr. 685; Tourville v. Naish, 3 P. W. 307; Wigg v. Wigg, 1 Atk. 382, 384, 1 West Cas. T. Hardw. 680; Fitzgerald v. Burke, 2 Atk. 397; Story v. Lord Windsor, ib. 630; Hardingham v. Nicholls, 3 Atk. 304.

(b) Hedworth v. Primate, Hardr. 318; Harding v. Hardrett, Cas. T. Finch, 9; Bassett v. Nosworthy, ib. 102, cited Prec. Ch. 249, and 2 Ves. jun. 457; Meynell v. Garraway, Nels. 63; Culpeper's case, cited 2 Freem. 124; Bishop of Worcester v. Parker, 2 Vern. 255; Lowther v. Carleton, Cas. T. Talb. 187; Hagshaw v. Yates, 1 Stra. 240; Jerrard v. Saunders, 1 Ves. jun. 454. See Duke of Albemarle v. Viscountess Purbeck, Cas. T. Finch, 252.

(c) Sherly v. Fagg, 1 Ch. Cas. 68; Higgon v. Syddal, ib. 149; Anon. 2 Ch. Cas. 4; Ferrat v. Ballard, ib. 73; Bassett v. Nos-

worthy, Cas. T. Finch, 102; Everenden v. Vanacker, ib. 245; Day v. Arundel, Hardr. 510; Millard's case, 2 Freem. 43; Rogers v. Seale, ib. 84; Anon. ib. 275; Hall v. Atkinson, 1 Eq. Cas. Abr. 333, Ca. 4, 2 Vern. 463; Williams v. Lane, 8 Bro. P. C. ed. Toml. Append. 291; Senhouse v. Earl, 2 Ves. 450; Aston v. Aston, 3 Atk. 302; Siddon v. Charnells, Bunb. 298; Sweet v. Southcote, 2 Bro. C. C. 66, 2 Dick. 671; Jerrard v. Saunders, 1 Ves. jun. 454.

(d) Sherly v. Fagg, 1 Ch. Cas. 68; Sir John Fagg's case, cited 2 Ch. Cas. 23, 2 Freem. 123, 2 Vern. 159, and 2 Ves. jun. 457; Burnel v. Ellis, and Harcourt v. Knowel, cited 2 Vern. 159.

(e) Anon. cited 2 Freem. 123.

(f) Sanders v. Deligne, 2 Freem. 123.

(g) Anon. 2 Ch. Cas. 208; Jefferson v. Dawson, 1 Ch. Cas. 267, S. C., misprinted, (h) Churchill v. Grove, 1 Ch. Cas. 35, 2 Freem. 176, Nels. 89.

(i) Ibid.

(j) Hedworth v. Primate, Hardr. 318.

(k) See Greswold v. Marsham, 2 Ch. Cas. 170, cited Amb. 154, and 3 Mer. 224.

(l) Meynell v. Garraway, Nels. 63.

his purchase deed may protect him against marriage articles.(m) A purchaser is, also, so far protected against a judgment, that a Court of Equity will not oblige him to discover what lands may be liable to the judgment.(n)

Not only a person who is seised or possessed of the legal estate, but also, it is said, he who has the best right to call for that estate, may shelter himself under the plea of purchase for valuable consideration, and without notice.(o)

A purchaser *bond fide*, for valuable consideration, and without notice, and who claims under a conveyance, as distinguished from articles only, although he may not be seised or possessed of the legal estate, yet, if he is in possession of the land, is so far protected in equity, that if, to a claim against him, he pleads his purchase, the Court will not oblige him to deliver up his title deeds, or discover his title; and consequently the purchaser may *to this extent be protected against a settlement, under which it may appear the legal estate is vested in the party, who claims against him.(p)

Lord Loughborough created a distinction between the cases, where the purchaser is, and where he is not, in possession of the land. In *Strode v. Blackburne* the purchaser, a mortgagee in fee, was not in possession of the land, and to a bill filed against her by the owner in possession, praying a delivery of the title deeds, she pleaded her purchase. Lord Loughborough ordered this plea to stand for an answer, with liberty to except; and the design of this order seems to have been, to oblige the defendant to discover and deliver up deeds, which might benefit the plaintiff, and could not injure the defendant herself.(q) This case appears, however, to be overruled by a directly contrary decision made by Lord Eldon in *Wallwyn v. Lea*. The purchaser, a mortgagee, was not in possession of the land, and to a bill filed against him by the owner in possession, praying a delivery of the title deeds, he pleaded his purchase; and this plea was by Lord Eldon allowed.(r)

If a purchaser claims under articles only, as distinguished from a conveyance, and therefore is seised or possessed of an equitable estate only, and not of the legal estate, it appears he cannot, although he is in possession of the land, defend himself in equity by the plea of purchase without notice.(s)

It is clear that a purchaser, who at the time he pays his money, or when the conveyance is executed, has notice of a trust, is bound by that trust.(t) But if a purchaser, who at the time he *paid his money, and the conveyance was executed, had not notice of

(m) *Bullock v. Sadler*, Amb. 764.

(n) *Snelling v. Squib*, 2 Ch. Cas. 47.

(o) *Medlicott v. O'Donel*, 1 Ball & B. 171.

(p) *Sherly v. Fagg*, 1 Ch. Cas. 68; *Bur-lace v. Cooke*, 2 Freem. 24. See also *Parker v. Blythmore*, Prec. Ch. 58, 2 Eq. Cas. Abr. 79; *Kelsall v. Bennett*, 1 Atk. 522, 1 West Cas. T. Hardw. 22; *Warrick v. Warrick*, 3 Atk. 291, 292; *Siddon v. Charnells*, Bunb. 298; *Jerrard v. Saunders*, 2 Ves. jun. 454; *Strode v. Blackburne*, 3 Ves. 225; *Wallwyn v. Lea*, 9 Ves. 24; *Pen-*

nington v. Beechey, 2 Sim. & St. 282; and *Jackson v. Rowe*, ib., 472, 4 Russ. 514.

(q) 3 Ves. 222.

(r) 9 Ves. 24.

(s) *Fitzgerald v. Fauconbridge*, or *Fauconberge*, Fitzg. 207, 2 Eq. Cas. Abr. 677, Ca. 3, 6 Bro. P. C. ed. Toml. 295, cited 3 Atk. 377, 378; *Brandlyn v. Ord*, 1 Atk. 571, 1 West Cas. T. Hardw. 512; *Hart v. Middlehurst*, 3 Atk. 371.

(t) *More v. Mayhow*, 1 Ch. Cas. 24, 2 Freem. 175; *Bovy v. Smith*, 2 Ch. Cas. 124, 1 Vern. 144; *Black v. Cock*, Cas. T.

a particular trust (as distinguished from a trust which attends the inheritance,) afterwards with notice of it procures a conveyance of the legal estate from the trustee, it appears not to be certain, that this legal estate will not so far protect him, that a Court of Equity, although it will not "assist him in any thing," will "let him make the best of it he can at law."^(u) The trustee, it cannot be doubted, will be liable to make satisfaction to the *cestui que trust*;^(v) but the purchaser himself seems to be as much entitled to favour, as is he, who, having notice of a legal estate, protects himself against it, by acquiring possession of a deed, for a reward, or by trick, or by theft.^(w)

If a purchaser is not seised or possessed of the legal estate, a Court of Equity cannot afford him relief against a party, in whom the legal estate is rightfully vested, and who needs not the aid of equity to obtain possession at law.^(x) And accordingly such purchaser, although without notice, may be evicted under an old settlement of the property.^(y)

As a mortgagee is a purchaser *pro tanto*, and his title to priority often depends wholly on the protection afforded by the legal estate, the foregoing statement on the protection, which a purchaser frequently receives from that estate, may not be thought irrelevant to, or an unnecessary digression from, the main subject of the present Chapter.

This section of that Chapter it may be allowed to close by noticing the following distinctions offered by dower. Dower forms an exception to the doctrine of notice to a purchaser. A purchaser *bonâ fide*, and for a valuable consideration, may, *by procuring an assignment of an outstanding satisfied term, protect himself against [*405] the dower of the wife of his vendor, although at the time of his purchase he had actual notice that the vendor was married, and that his wife was entitled to dower.^(z) In many cases, it has been seen, a Court of Equity will not assist an equitable title against a purchaser in possession of the legal estate; or a claim grounded on the legal estate, against a purchaser who may not be in possession of that estate. Between this title or claim, and a bill in equity to set out dower, Lord Thurlow created a distinction in *Williams v. Lambe*. A bill for dower stated that the plaintiff was married to W. W.; that W. W., being seised of lands, &c., in D. during the coverture, sold the same to the defendant; and prayed a discovery of the lands, and that the defendant might assign to her one third part as her dower. The defendant pleaded to the discovery and relief, that he was a purchaser of the estate for valuable consideration, without notice of the vendor being married. Lord Thurlow said, "The only question was, whether a plea of purchase, without notice, would lie against a bill to set out dower; that he thought where the party

Finch, 449; *Attorney General v. Gower*, 2 Eq. Cas. Abr. 685; *Walley v. Walley*, 1 Vern. 484; *Pye v. Gorge*, 1 P. W. 128; *Mansell v. Mansell*, 2 P. W. 678, 681; *Willoughby v. Willoughby*, 1 Durn. & E. 771; *Pearce v. Newlyn*, 3 Madd. 186; *Kennedy v. Daly*, 1 Sch. & Lef. 355.

^(u) *Sanders v. Deligne*, 2 Freem. 123; *Saunders v. Dehew*, S. C., 2 Vern. 271.

^(v) See 1 Durn. & E. 771.

^(w) *Sherley v. Fagg*, 1 Ch. Cas. 68, cited 2 Freem. 123, 2 Vern. 159, 2 Ves. jun. 457;

Burnel v. Ellis, and *Harcourt v. Knowel*, cited 2 Vern. 159; *Anon.* cited 2 Freem. 123.

^(x) *Collins v. Archer*, 1 Russ. & M. 284.

^(y) *Needler v. Wright*, Nels. 57.

^(z) *Bodmin, or Radnor, v. Vandebendy*, 1 Vern. 356, 2 Ch. Cas. 172, Prec. Ch. 65, Show. P. C. 69; *Swannock v. Lyford*, Amb. 6; *Hill v. Adams*, S. C., 2 Atk. 208; *Wynne v. Williams*, 5 Ves. 130, 134; *Maundrell v. Maundrell*, 10 Ves. 246, 261, 271; *Mole v. Smith, Jacob*, 496, 497.

is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an equitable, not to a legal claim." He therefore overruled the plea. (a) According to another note of this judgment, Lord Thurlow said, "The jurisdiction of this Court in assigning dower is founded on a pure legal title of the dowress, (so pure, that it does not attach upon an equitable estate,) which this Court can give effect to, with a greater degree of convenience, than can be had before a jury on a writ of dower." (b) The ground of this decision seems to be, that the dowress was not come into equity, to ask the Court to help her to recover at law, but was come there to pray the Court to exercise its own jurisdiction to assign dower.

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*SECTION III.

OF SEVERAL EXCEPTIONS TO THE RULE OF PRIORITY.

1. It may, in the first place, be mentioned, that the law, and an equal equity, may give priority to a farther charge, on which money is lent by a mortgagee of the legal estate. This farther charge will be payable before a mortgage, or incumbrance, intervening between such charge and the original mortgage. (c)

2. The law, and an equal equity, may give priority to a statute or judgment, on which a mortgagee of the legal estate has lent more money. The statute, or judgment, will be payable before a mortgage, or incumbrance, intervening between such statute or judgment and the original mortgage. (d)

3. The law, and an equal equity, may, it would seem, give priority to a farther charge, on which a mortgagee of the legal estate has lent money, and whose original mortgage is made to secure not only a sum of money already lent, but also such other sums as shall hereafter be lent. Such after lent sums will be payable before a mortgage, or incumbrance, intervening between this loan and the original mortgage. (e)

4. The law, and an equal equity, may give priority to a mortgage, or judgment, bought by a mortgagee of the legal estate. This mortgage or judgment bought will be payable before a mortgage, or other incumbrance, intervening between the incumbrance so bought and the original mortgage. (f)

[*407] And the whole *amount of the incumbrance will, it seems, be payable, although bought for a sum less than that amount. (g) It may here be added, that if a stranger purchases

(a) 3 Bro. C. C. 264, cited 1 Russ. & M. 292.

(b) 3 Bro. C. C. ed. Belt, 265, n. (2).

(c) Hedworth v. Primate, Hardr. 318; Goddard v. Complin, 1 Ch. Cas. 119; Blackston v. Moreland, 2 Ch. Cas. 20; Anon. 2 Freem. 6, pl. 7; Wrightson v. Hudson, 2 Eq. Cas. Abr. 609; Bedford v. Backhouse, or Bacchus, ib. 615; Hasket v. Strong, 1 Stra. 689; Barnett v. Weston, 12 Ves. 130. See Cooper v. Cooper, Nels. 153.

(d) Brace v. Duchess of Marlborough, 2

P. W. 494, fourth point. Shepherd v. Titley, 2 Atk. 348, 352; Anon., or Jackson v. Langford, 2 Ves. 662; Ex parte Knott, 11 Ves. 617. See also Cason v. Round, Prec. Ch. 226, 2 Eq. Cas. Abr. 594.

(e) Gordon v. Graham, 7 Vin. Abr. 52, 2 Eq. Cas. Abr. 598.

(f) Morret v. Paake, 2 Atk. 52; Anon., or Jackson, v. Langford, 2 Ves. 662. These cases appear to contradict Breerton v. Jones, 1 Eq. Cas. Abr. 326.

(g) Morret v. Paake, 2 Atk. 54.

a mortgage,(h) or a mortgagee buys in an incumbrance;(i) although either incumbrance is bought for a sum less than the amount of it, the whole of that amount must be paid by the mortgagor, or his heir at law, who comes to redeem.(j)

5. The law, and an equal equity, may give priority to a third or later mortgagee, who has paid off the first mortgagee, seised or possessed of the legal estate, and obtained from him a conveyance of that estate. Here the third or later mortgage is, as well as the first, to be paid before any mortgage or incumbrance intervening between the first mortgage and the original mortgage of the third or later mortgagee, by whom the first was paid off.(k) Such third or later mortgagee has on his side an equal equity, and also the law, namely, the legal estate, which, as a plank from the wreck, *tabula in naufragio*,(l) justifiably seized on for self-preservation, a Court of Equity allows him to keep.(m) And the same mode of self-preservation is allowed to an equitable mortgagee, *or one [*408] who has lent money on an agreement in writing to secure it by mortgage.(n)

To the mortgagee in the five preceding cases seised or possessed of the legal estate applies also, it would seem, the principle of tacking. He has the legal right under the forfeiture, and an equal equity to be paid the subsequent incumbrance. He has, therefore, the law on his side, and an equal equity; and, by reason of that equity, he is allowed to stand on his legal title, and resist redemption, until payment of both incumbrances.

6. The law, and an equal equity, may give priority to a mortgagee of the legal estate, who obtained this security after an equitable mortgage made by an agreement to mortgage,(o) or by a deposit of title deeds.(p)

7. The law, and an equal equity, may give priority to a second or later mortgagee, who has bought in a statute entered into by the mortgagor.(q)

Of statutes, there are a statute-merchant and a statute-staple. Each is a security for a debt, and consists of a recognizance, and of an obligation

(h) *Philips v. Vaughan*, 1 Vern. 386; *Williams v. Springfield*, ib. 476; *Anon.* 1 Salk. 155.

(i) *Baker v. Hellett, or Kellet, Nels.* 117, 3 Ch. Rep. 23; *Darcy v. Hall*, 1 Vern. 49; *Assough v. Johnson*, 2 Vern. 66.

(j) On an incumbrance bought for less than its value, by an heir, trustee, executor, or agent, see *Darcy v. Hall*, 1 Vern. 49; *Brathwaite v. Brathwaite*, ib. 334; *Long v. Clopton*, ib. 464; *Anon.* 1 Salk. 155; *Morret v. Paske*, 2 Atk. 64.

(k) *Marsh, or March, v. Lee*, 2 Ventr. 337, 1 Ch. Cas. 162, and *Shelly's case*, or *Middleton v. Shelleh*, there cited; *Middleton v. Shelly*, 1 Lev. 197; *Bovey v. Skipwith*, 1 Ch. Cas. 201; *Anon.* 2 Freem. 6, pl. 7; *Cockes v. Sherman*, ib. 13; *Sherman v. Cox*, 3 Ch. Rep. 83; *Shermer v. Robbins & Cox*, Cas. T. Finch, 406; *Hawkins v. Taylor*, 2 Vern. 29; *Brace v. Duchess of Marlborough*, 2 P. W. 491, first point; *Belchier v. Butler, or Renforth*, 1 Eden, 523, 5 Bro. P. C. ed.

Toml. 292; *Robinson v. Davison*, 1 Bro. C. C. 63; *Cator v. Cooley*, 1 Cox, 182. See the question put by Lord Eldon, in *Mackreth v. Symmons*, 15 Ves. 335. The authorities referred to in this note make it doubtful, if that question is correctly reported.

(l) This expression is universally attributed to Sir M. Hale; but the author has not met with the occasion, on which that learned judge made use of it.

(m) 2 Ventr. 338, 339, 2 P. W. 491, 2 Ves. 573, 574, 1 Eden, 529, 530, 1 Durn. & E. 767.

(n) *Matthews v. Cartwright*, 2 Atk. 347.

(o) *Morecock v. Dickens, Amb.* 678. See *Right v. Bucknell*, 2 B. & Adol. 278.

(p) *Plumb v. Fluit*, 2 Anstr. 432.

(q) *Marsh, or March, v. Lee*, 2 Ventr. 337, 1 Ch. Cas. 162; *Anon.* 2 Ch. Cas. 208; *Jafferson v. Dawson*, S. C., misprinted, 1 Ch. Cas. 267; *Windham v. Lord Richardson*, 2 Ch. Cas. 212; *Stanton v. Sadler*, 2 Vern. 30.

sealed; and such security is called a statute, because it was by statute, or Act of Parliament, ordained to be a security.

The recognizance and obligation, called a statute-merchant, were made a security by the Statute of Merchants, 13 Edw. I., st. 3, c. 1; which gave a particular force to such security, when the debt was acknowledged before the Mayor of London, or certain other persons.^(r) The recognizance and obligation, called a statute-staple, were made a security by the Statute of the Staple, 27 Edw. III., st. 2, c. 9; which gave a particular force to such security, when the debt was acknowledged before

[*409] the Mayor of a Staple; that is, of a place by the statute 27 Edw. *III., st. 2, c. 1, appointed to be a staple or mart of certain merchandize.^(s) If the debt is not paid pursuant to the recognizance and obligation, then under each of the statutes, 13 Edw. I., st. 3, c. 1, and 27 Edw. III., st. 2, c. 9, the lands of the debtor may be extended, that is, appraised, and delivered to the creditor, to hold until by the ordinary profits, according to the extended value, or by them and by casual profits, such as mines, or felling of trees, the whole debt, that is, the whole pain or penalty of the statute, and also certain damages and costs of the conusee, are levied.^(t) These acts of Parliament authorise, it appears, execution of lands in ancient demesne;^(u) but not, it should seem, of copyholds held at the will of the lord.^(v) At law, the debtor is entitled to an account of the receipt of the ordinary profits, and of the casual profits, and may, by means of a writ of *scire facias ad computandum*, compel the creditor to render it. But this account, which, of the ordinary profits, the creditor may be compelled to give, is of such profits at the extended or appraised value only of the land. If, by the ordinary profits at that value, or by them and by casual profits, more than the penalty of the statute has been levied, then the debtor is entitled to the surplus; deducting, however, out of this surplus, certain damages and costs which the creditor may retain. But if the land is extended below its true value, then after the penalty of the statute, and certain damages and costs of the creditor, have been paid by the ordinary profits at the extended value, or by them and by casual profits, at law the creditor is entitled to keep all the surplus ordinary profits, composed of the difference between the extended and the true value.^(w) In a

[*410] Court of Equity, however, *the debtor may have an account of the ordinary profits, at their true value; and after the real debt, it is presumed, as distinguished from the penalty of the statute, and also the conusee's damages and costs, are by the ordinary profits at their true value, or by them and by casual profits, paid; in that Court, the debtor is entitled to the surplus profits received.^(x)

(r) On a statute-merchant, and the statute de Mercatoribus, see *Meakin v. Hickford*, Bridgm. 16, 19.

(s) On the word Staple, see 4 Inst. 238, 282, and Spelm. Gloss. v. Stapula. And see forms of an obligation of a statute-merchant & statute-staple, Mad. Form. Angl. p. 361, 366.

(t) Fulwood's case, 4 Co. 67, b.; Hedworth v. Primate, Hardr. 318; Marsh v. Lee, 2 Vent. 337; Brace v. Duchess of Marlborough, 2 P. W. 493, third point.

(u) Huntingfield's case, 2 Inst. 397; *Martin v. Wilks*, Mo. 211.—Bro. Abr. tit. Faux. de Recov. pl. 25, tit. Aunc. Dem. pl. 37, tit. Execution, pl. 91, 2 Rol. Abr. tit. Statutes, P. pl. 8, 4 Inst. 270, Hob. 48.

(v) Heydon's case, Mo. 128, 3 Co. 8; 2 Shep. Touch. ed. Prest. 360.

(w) Fulwood's case, 4 Co. 67 b., Marsh v. Lee, 2 Vent. 338.

(x) Marsh v. Lee, 2 Vent. 338.

A second, or later mortgagee, who buys in a statute, seems to obtain a priority of the following nature. Because the land is taken in execution, and under the delivery the mortgagee, who purchased in the statute, is possessed of the legal estate; for this reason, and because such mortgagee has also on his side an equal equity, a Court of Equity leaves the parties to law, and will not interpose to compel an account of the ordinary profits at the true value of the lands. The mortgagee, who bought the statute in, is therefore at law and in equity entitled to keep possession of the lands, until by the ordinary profits at the extended value, or by them and by casual profits, the whole penalty of the statute, and also certain damages and costs of the conusee, are satisfied; and such mortgagee may apply the surplus ordinary profits, composed of the difference between the extended and the true value, in or towards payment of the money paid by him for the statute, and of his mortgage debt.(y) When however, by the ordinary profits, at the extended value, or by them and by casual profits, the penalty of the statute, and the conusee's damages and costs, are satisfied, then the statute may be vacated; and so soon as it is vacated, the legal estate, and consequently the advantage gained by it, may be withdrawn from the mortgagee who bought it in.(z)

8. The law, and an equal equity, may give priority to a farther charge made on land taken in execution under a statute. Until by the ordinary profits at the extended value, or by them and casual profits, the penalty of the statute is levied, the farther *charge will be payable [*411] before any mortgage or incumbrance intervening between the statute and the farther charge. But so soon as the penalty of the statute is levied, that priority is gone.(a) The conusee has not then the law on his side, but an equity only.

9. The law, and an equal equity, may, it seems, give priority to a second or later mortgagee, who has bought in a recognizance or obligation in the nature of a statute-staple.(b) And the nature of the priority, which may be gained by buying in such recognizance, is, it is presumed, the same as that of the priority obtainable by the purchase of a statute-staple. The recognizance in the nature of a statute-staple was introduced by the statute 23 Hen. VIII., c. 6.(c) The statute-staple was meant to be a security only between merchant and merchant of the same staple-town, and for merchandize of that staple. But in the course of time, such statute grew to be a common security adopted by other persons also. As, however, the Act of Parliament, which originated the statute-staple, did not authorize, and as several inconveniences had followed from, such different use of it, the statute, 23 Hen. VIII., c. 6, put a stop

(y) *Hedworth v. Primate*, Hard. 318; *Marsh v. Lee*, 2 Ventr. 337; *Brace v. Duchess of Marlborough*, 2 P. W. 491, third and fifth points.

(z) *Brace v. Duchess of Marlborough*, 2 P. W. 493, third point. See also *Earl of Huntington v. Grenville*, 1 Vern. 52.

(a) *Hedworth v. Primate*, Hardr. 318, and *Poole v. Dudley*, there cited. In the latter part of the report of *Hedworth v. Primate*, it is said, "The Chief Baron and the whole Court held, that the defendant here should not be relieved in equity, for any money lent since the settlement upon the credit

of his former security, for then no purchaser could be safe." As this passage clearly contradicts the former part of the report, it ought perhaps to be read with this correction—"that, beyond the penalty of the statute, the defendant here, &c."

(b) *Hacket v. Wakefield*, Hardr. 172.

(c) The statute itself prescribes the form of the recognizance or obligation. See also the same form in 2 Orl. Bridgm. Con. 53. And see forms of an assignment of a recognizance or obligation in the nature of a statute-staple, Orl. Bridgm. Conv. 1 vol. 89, 255 2 vol. 64, 223.

to that practice, and again confined the use of the statute-staple to merchants and merchandize of a staple-town; and at the same time provided a new description of recognizance or obligation to secure the payment of debt. This recognizance may be used between any persons, and may be taken by the Chief Justice of the King's Bench, or of the Common Pleas, and, in their absence out of the term, by the Mayor of the Staple [*412] of Westminster, and the *Recorder of the city of London, jointly together; and in default of payment of the debt, the conusee may have against the land of the conusor the same execution, to which a conusee of a statute-staple is entitled under the statute, 27 Edw. III., st. 2, c. 9.

10. The law, and an equal equity, may give priority to a second or later mortgagee, who has bought in a judgment.(d)

Possession of land by means of a judgment is provided by the Statute Westminster 2, 13 Edw. I., c. 18. It is by it enacted, "When debt is recovered or knowledged in the King's Court, or damages awarded, it shall be from henceforth in the *election* of him that sueth for such debt or damages, to have a writ of *feri facias* unto the sheriff for to levy the debt of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor, and the one half of his land, until the debt be levied upon a reasonable price or extent." If the creditor elects to have one half of the land, the writ directed to the sheriff is called an *elegit*. And he to whom the land is delivered by *elegit*, under a judgment for debt, is possessed of a chattel estate, until out of the ordinary profits of the land, at the extended value, or out of them and by casual profits, the debt is levied.(e) And so soon as the debt is levied out of such ordinary profits, the debtor may enter.(f) At law, the debtor is entitled to an account at the extended value only;(g) which, generally speaking, is much below the true value.(h) And if, on taking such account, it is found that the creditor is satisfied, the debtor may then enter.(i) But, in a Court of Equity, the debtor may have an account at the true value of the land.(j) At law, the creditor may keep the surplus profits, composed of the difference between *the extended and the true value; but in [*413] equity that surplus is applied in payment of the debt.(k)

A judgment debt is, it is observable, a chose in action; a property which, in some sense, is not assignable at law.(l) It is there assignable; but if the assignee seeks payment of it at law, he must do this, not in his own name, but in the name of the assignor;(m) and, accordingly, a power for that purpose is commonly put into the instrument of assignment.(n)

A second or later mortgagee, who buys in a judgment debt, may gain a

(d) Higgon v. Syddal, 1 Ch. Cas. 149; Edmunds v. Povey, 1 Vern. 187. See Cockes v. Sherman, 2 Freem. 14, 15.

(e) 2 Inst. 396; Co. Litt. 42 a., 43 b.; 2 Bl. Com. 161.

(f) 2 Inst. 396; 4 Co. 67 b.; Cro. Car. 598; 2 Vent. 336. See Doughty v. Styles, Cas. T. Finch, 115.

(g) 2 P. W. 494; 2 Atk. 53; 3 Atk. 517; 1 Ves. 250; 3 Y. & Jerv. 395. See Price v. Varney, 3 B. C. 733.

(h) 3 Atk. 517; 2 P. W. 494; 3 Y. & Jerv. 395.

(i) 2 Inst. 396; 4 Co. 67 b.; Cro. Car. 598; 2 Vent. 336. See Price v. Varney, 3 B. & C. 733.

(j) 3 Atk. 517; 1 Ves. 250; 3 Y. & Jerv. 395.

(k) 3 Atk. 517; 1 Ves. 250; 3 Y. & Jerv. 395.

(l) Co. Litt. 214 a.; 2 Bl. Com. 442.

(m) Bro. Abr. tit. *Chose in Act.*, pl. 3; 2 Bl. Com. 442.

(n) See a form of an assignment of a judgment debt, 1 Orl. Bridgm. Conv. 315.

priority, if the land in mortgage is taken in execution under the writ of *elegit*. The priority so gained seems to be of this nature.—By means of the *elegit*, the mortgagee either is himself in possession of a moiety of the land, or is entitled to receive from a tenant the rent of a moiety. (o) If he himself is in possession, or if he has the right to receive rent from a tenant, he is at law entitled, in the one case, to hold the possession and take the profits, and, in the other, to receive the rent, until, on an account of the ordinary profits, at the extended value, or of them and of casual profits, the judgment debt is satisfied. (p) As at law he cannot be brought to account except at the extended value, and which usually is much below the true value, such mortgagee may at law, after the judgment debt is satisfied by the true value, apply the surplus, composed of a difference between the extended and true value, in or towards payment of his debt by mortgage. And because he has in this way the law on his side, and has also an equity equal to that of a former mortgagee or incumbrancer, a Court of Equity will not disturb that advantage gained by him at law. (q) And if at law he can hold the possession, or procure payment of the rent, after the judgment debt is, at the extended value, satisfied, or, perhaps it may be *stated, even after that satisfaction is entered [*414] on the record, a Court of Equity will, it seems, leave this [mortgagee and the former mortgagee or incumbrancer to combat at law, and will not interpose to let the latter in upon the estate, until, by the profits at their true value, the mortgagee, who has obtained an advantage at law, is paid, not only the judgment debt bought by him, but also his debt on mortgage. (r)

11. The law, and an equal equity, may, it seems, give priority to a second or later mortgagee, who has bought in a common law recognizance or obligation, before some Court of Record entered into for the payment of debt. (s)

When a debt secured by this kind of recognizance is not paid, a moiety of the land of the conusor may be taken in execution under the writ of *elegit*, which is by the Statute Westminster 2, provided as well for this recognizance as for a judgment. (t)

The nature of the priority, which may be gained by buying in a common law recognizance, is, it is presumed, the same, as that of the priority obtainable by the purchase of a judgment.

12. The law, and an equal equity, may, it appears, give priority to a

(o) Cambell's case, 1 Rol. Abr. 894; Doe v. Wharton, 8 Durn. & E. 2.

(p) 2 Inst. 396; 3 Atk. 517; 1 Ves. 250; Price v. Varney, 3 B. & C. 733.

(q) Brace v. Duchess of Marlborough, 2 P. W. 494, fifth point; Morret v. Paske, 2 Atk. 53; Wortley v. Birkhead, 2 Ves. 574.

(r) Higgon v. Syddal, 1 Ch. Cas. 149, cited 2 P. W. 493; Edmunds v. Povey, 1 Vern. 187; Brace v. Duchess of Marlborough, 2 P. W. 494, fifth point; Morret v.

Paske, 2 Atk. 53. See also Stanton v. Sadler, 2 Vern. 30; Hitchcock v. Sedgwick, ib. 158, 159; Sanders v. Deligne, 2 Freem. 123; Collet v. De Gols, Cas. T. Talb. 69; and Stanhope v. Earl Verney, 2 Eden, 85.

(s) Hacket v. Wakefield, Hardr. 172. On this kind of recognizance, see Bro. Abr. tit. *Recognizance*, pl. 8, 14, Vaugh. 102, 103, Hob. 195, 2 Bl. Com. 341, Finch L. p. 51. ed. 1759, p. 162.

(t) 2 Inst. 395; Cro. Car. 598; Hardr. 172.

second or later mortgagee, who has bought in a satisfied incumbrance;(u) as a mortgage,(v) statute,(w) or judgment.(x)

[*415] The advantage that may be gained by the possession of the *legal estate, conferred by either of these satisfied securities, consists perhaps in the circumstance, that so long as the mortgagee, who has bought it in, can at law retain that estate, a Court of Equity will leave him, and any intervening mortgagee or incumbrancer, to combat at law, and will not interpose to take from him any aid, which the law may give him to procure payment of his mortgage debt.(y)

13. The law, and an equal equity, may give priority to a second or later mortgagee, who has procured an assignment of a satisfied term of years.

The principle is, that the assignment makes the assignee a tenant; namely, the tenant entitled to the present possession of the land, and therefore to enter, or, if necessary, to obtain that possession by ejectment.(z) At law, the term is what is called a term in gross;(a) and when the assignee of it is tenant in possession, at law he may hold, and take the yearly rents and profits, until the term is determined,(b) and apply those rents and profits in or towards satisfaction of the mortgage debt. And because this mortgagee has the law on his side, and also an equity equal to that of any other incumbrancer, a Court of Equity will not take from him the advantage gained by him at law.(c)

Where there is a satisfied term, a trust to attend the inheritance is often expressly annexed to it; and when such trust is not expressly annexed to it, then, by construction of a Court of Equity, the term may attend the inheritance.(d)

A distinction was, it seems, once attempted to be introduced, that a satisfied term constructively attendant might be assigned to, or in trust for, a particular purchaser or mortgagee; but that a satisfied term, when it had been once assigned to attend the inheritance, could not afterwards [*416] be assigned to, or in trust for, *any particular purchaser or mortgagee.(e) But this distinction was not allowed; and clearly the term may in either case be assigned for such protection.(f)

(u) Lord Chief Justice Holt v. Mill, 2 Vern. 279. See also Sir John Fagg's case, cited 2 Vern. 58, and Hitchcock v. Sedgwick, ib. 158, 159. Generally on the satisfaction or determination of a statute, or execution by *elegit*, see Fulwood's case, 4 Co. 64 b.; Dighton v. Groenvil, 2 Ventr. 332, 335, 336; Marsh v. Lee, ib. 338, and Burwell v. Harwell, Cro. Car. 597.

(v) Turner v. Richmond, 2 Vern. 81.

(w) Anon. 2 Ch. Cas. 208, probably misprinted Anon., instead of the next case in same page. Jefferson v. Dawson, S. C., misprinted, 1 Ch. Cas. 267; Stanton v. Sadler, 2 Vern. 30.

(x) Edmunds v. Povey, 1 Vern. 187, cited 2 P. W. 494. See Prec. Ch. 495, and Cockes v. Sherman, 2 Freem. 13, 14.

(y) Anon. 2 Ch. Cas. 208; Stanton v. Sadler, 2 Vern. 30; Cockes v. Sherman, 2 Freem. 13. See also Higgon v. Syddal, 1 Ch. Cas. 149, and Brace v. Duchess of Marlborough, 2 P. W. 493.

(z) Willoughby v. Willoughby, 1 Durn.

& E. 767; Goodtitle v. Morgan, ib. 755; Right v. Bucknell, 2 B. & Adol. 278.

(a) 1 Durn. & E. 765; 1 Bro. C. C. 69, 70; 7 Ves. 577.

(b) 1 Durn. & E. 765.

(c) Willoughby v. Willoughby, 1 Durn. & E. 763, 767, 770, 772; Evans v. Bicknell, 6 Ves. 184, 185; Maundrell v. Maundrell, 10 Ves. 260, 270; Mole v. Smith, Jacob, 496.

(d) 1 Durn. & E. 766, 768; 1 Bro. C. C. 70; 10 Ves. 259, 260, 270.

(e) 1 Durn. & E. 766; Amb. 284. By the former report, Lord Hardwicke, in stating the distinction, is made to divide it into two branches; but this is perhaps a mistake, for the second seems to be a mere repetition in other words of the first. The same distinction, stated in 1 Collect. Jurid. 357, 358, is evidently incorrect. The distinction in question was attempted by counsel, and will be found in 1 Collect. Jurid. 341.

(f) Oxwick v. Brockett, 1 Eq. Cas. Abr. 355; Willoughby v. Willoughby, 1 Durn.

It is certain that a second or later mortgagee is, both at law and in equity, allowed to protect himself by procuring an assignment of a satisfied term. But although in him this conduct is unimpeachable, it is perhaps doubtful whether the trustee, if he is aware of an earlier mortgage, is safe in making that assignment. Lord Hardwicke appears to have thought such assignment to be a breach of trust, for which the trustee ought to make satisfaction.(g) His Lordship, it is said, considered the question to be, not whether the purchaser(h) should hold under the breach of trust, but whether the trustee should be punished.(i) He thought the purchaser would be safe in taking the assignment, if he could get it, but would not say the trustee would be safe.(j) Contrary to this doctrine, Lord Eldon seems to have expressed an opinion, that if the purchaser would be safe, the trustee ought to be so.(k)

14. The law, and an equal equity, may give priority, before a mortgagee, to a judgment creditor whose incumbrance is earlier than the mortgage, and who has procured a conveyance of the legal estate from a satisfied mortgagee,(l) or an assignment of a satisfied term of years.(m)

15. When a satisfied term of years is still outstanding, [*417] namely, *either in the original termor, or his representative, [or assignee, or in a person to whom it has been assigned generally in trust to attend the inheritance, and it has not been assigned to or in trust for any particular mortgagee or incumbrancer, the first benefit of, or priority conferable by it, belongs to that incumbrancer who, in order of time, is the first incumbrancer on the estate; as a mortgagee,(n) or creditor by judgment.(o) In these cases, a Court of Equity applies the rule, *qui prior est tempore potior est jure*,(p) unless some other party has a better right to call for the legal estate; that is, to call for an assignment of it to or in trust for himself;(q) for where this better right exists, the person who owns it is entitled to priority,(r) as a mortgagee,(s) or jointress,(t) or children entitled to portions under a marriage settlement,(u) or other persons claiming under such a settlement.(v)

A person may, in several ways, acquire the better right to call for the legal estate. In *Maundrell v. Maundrell*, Lord Eldon anonymously cited a case determined by Lord Cowper, (and which is probably *Wilkes v. Boddington*,(w)) "where the trustees of the term joined in a con-

& E. 763, 770, 771, 772; *Stanhope v. Earl Verney*, 2 Eden, 81, 85.

(g) 1 Durn. & E. 771; 10 Ves. 261; 11 Ves. 613.

(h) In this word Lord Hardwicke included a mortgagee. 1 Durn. & E. 767.

(i) "Lord Hardwicke says the question is not, whether the trustee shall be punished, but whether the purchaser shall hold under the breach of trust." 11 Ves. 613. The context in the same page seems to require the transposition, which the author has ventured to make of the two questions.

(j) 11 Ves. 613.

(k) 11 Ves. 613, 614.

(l) *Turner v. Richmond*, 2 Vern. 81.

(m) *Earl of Bristol v. Hungerford*, 2 Vern. 524; *Turner v. Richmond*, ib. 81.

(n) *Brace v. Duchess of Marlborough*,

2 P. W. 491, 495, seventh point; *Willoughby v. Willoughby*, 1 Durn. & E. 773.

(o) *Charlton v. Low*, 3 P. W. 328.

(p) 2 P. W. 495; 2 Ves. 486.

(q) 10 Ves. 270; 11 Ves. 618.

(r) *Earl of Pomfret v. Lord Windsor*, 2 Ves. 472, 486; *Maundrell v. Maundrell*, 10 Ves. 270; *Ex parte Knott*, 11 Ves. 618. See also *Clarke v. Abbot*, Barn. Ch. Rep. 457, 2 Eq. Cas. Abr. 606, Ca. 41, and *Ingram v. Pelham*, Amb. 153.

(s) *Stanhope v. Earl Verney*, 2 Eden, 81. See *Clarke v. Abbot*, Barn. Ch. Rep. 457.

(t) *Willoughby v. Willoughby*, 1 Durn. & E. 763, 774, 775.

(u) *Ibid.*

(v) *Wilkes v. Boddington*, 2 Vern. 599.

(w) 2 Vern. 599.

veyance to a purchaser, not conveying the term, but making themselves parties; which was therefore considered as a declaration, that they would hold for that purchaser. A subsequent purchaser tried to get a conveyance, but was not permitted, as upon the foot of the contract the trustees had given the other a better right to call for a conveyance.”(x) A mortgagee may also acquire the better right to call for the legal estate, if [*418] he has used the diligence to possess *himself of the deed that creates a satisfied term, which is that estate;(y) and therefore, by greater reason, he will acquire that right, if such a term has been assigned generally in trust to attend the inheritance, and he obtains possession of the deeds, by which the term was created and so assigned;(z) or if such a term has been assigned generally in trust to attend the inheritance, and, on a mortgage afterwards made, the mortgage conveyance contains a declaration, that the trustees shall stand possessed of the term in trust for the mortgagee, and the deeds respecting the term are delivered to the mortgagee.(a)

It remains to be noticed, that a later mortgagee, who has procured an assignment of a satisfied term to a trustee in trust for himself, may, notwithstanding this assignment, be obliged to yield priority to a former mortgagee, if there are circumstances that give this incumbrancer a better right to call for an assignment;(b) as if the second mortgagee became an incumbrancer *mala fide*, and with notice of a jointure, by means of which *mala fides* and notice the jointress, who is the first mortgagee, may demand the term to be assigned to a new trustee for her, and then compel the second mortgagee to redeem not only the jointure, but also her mortgage.(c)

SECTION IV.

OF CERTAIN CASES, IN WHICH AN INCUMBRANCER, ALTHOUGH HE HAS THE LAW ON HIS SIDE, MAY NOT HAVE AN EQUAL EQUITY.

OF incumbrancers, who, although they have the law on their side, may not have an equal equity, it may be mentioned,

[*419] 1. If a judgment creditor buys in a mortgage of the legal *estate, he will not, it appears, thereby gain for the judgment debt a priority before a mortgagee who, in order of time, is an incumbrancer between the judgment and the mortgage bought in.(d) The chief reason assigned for disallowing such priority of the judgment debt is, that this creditor did not lend his money on the security of particular land;(e) in other words, “on the credit of the land,”(f) or, “upon

(x) 10 Ves. 270.

(y) *Maundrell v. Maundrell*, 10 Ves. 260, 262, 271; *Ex parte Knott*, 11 Ves. 612, 613; *Mole v. Smith, Jacob*, 497.

(z) *Willoughby v. Willoughby*, 1 Durn. & E. 772.

(a) *Stanhope v. Earl Verney*, 2 Eden, 81.

(b) *Maundrell v. Maundrell*, 10 Ves. 270.

(c) *Willoughby v. Willoughby*, 1 Durn.

& E. 763, 773, 774, Amb. 282, 1 Collect. Jurid. 337.

(d) *Brace v. Duchess of Marlborough*, 2 P. W. 491, Mos. 50, cited 11 Ves. 617. See *Wright v. Pilling*, Prec. Ch. 494.

(e) Mos. 53; 11 Ves. 617. See also *Burgh v. Francis*, Cas. T. Finch, 28, 1 Eq. Cas. Abr. 320, 3 Swanst. 536, n.

(f) 2 P. W. 493.

the immediate view or contemplation of the conusor's real estate.”(g) The equity of the intervening mortgagee seems to be greater than that of the judgment creditor, because the former did, and the latter did not, lend his money on the security of the particular land. For the distinction which is made between a mortgagee, who buys in a mortgage of the legal estate, and who may by that means gain a priority for his own mortgage debt, and a judgment creditor who makes that purchase, these reasons are assigned,—that a mortgagee lends his money on the security of particular land, but “the judgment creditor does not lend his money upon the immediate view or contemplation of the conusor's real estate, for land afterwards purchased may be extended on the judgment; nor is he deceived or defrauded, though the conusor had before made twenty mortgages of all his real estate; whereas a mortgagee is defrauded or deceived, if the mortgagor before that time mortgaged his land to another.”(h)

2. A mortgagee, or other incumbrancer, although he has the law on his side, may not have an equal equity, if, at the time he lent his money, he had notice of a former mortgage or incumbrance.(i) Clearly the former mortgagee or incumbrancer hath the greater equity.

If a third mortgagee lends his money, with notice of the second mortgage, and afterwards buys in the legal estate of the first mortgagee, the second mortgagee may redeem the legal estate on [*420] payment of the first mortgage only.(j) And if, with notice of a second mortgage, the first mortgagee lends, on a statute, more money to the mortgagor, the second mortgagee may redeem on payment of the first mortgage only.(k) If a mortgagee, with notice of a judgment subsequent to his mortgage, lends more money to the mortgagor on farther charge, this farther charge is not entitled to priority before the judgment.(l) If a second, or later mortgagee, lends his money with notice of a former mortgage, and afterwards obtains the legal estate by procuring an assignment of a satisfied term, such estate will not give him priority before the mortgage of which he had notice.(m)

It may here be mentioned, that in *Parry v. Wright*, an incumbrancer, who advanced his money with constructive notice of a second mortgage, and out of that money paid the first mortgage off, but did not keep this security on foot, was held not to be entitled, against the second mortgagee, to stand in the place of the first mortgagee; and this failure to keep the first security on foot had the effect to make the second mortgagee the first incumbrancer on the estate.(n)

(g) 2 P. W. 492; Mos. 51.

(h) 2 P. W. 492; Mos. 51, 53, 55; 11 Ves. 617. On fraud towards a mortgagee, by not giving him notice of prior mortgages, judgments, statutes, or recognizances, see the stat. 4 and 5 W. & M. c. 16, and *Stafford v. Selby*, 2 Vern. 589.

(i) *Willoughby v. Willoughby*, 1 Durn. & E. 767, 771, 2 Ves. 684.

(j) *Brothers v. Bence*, Fitzg. 118;

Cockes v. Sherman, 2 Freem. 14; *Toulmin v. Steere*, 3 Mer. 224.

(k) *Cason v. Round*, Prec. Ch. 226, 2 Eq. Cas. Abr. 594.

(l) *Sish v. Hopkins*, Amb. ed. Blunt, Append. 793.

(m) *Willoughby v. Willoughby*, 1 Durn. & E. 771; *Mole v. Smith*, Jacob, 496.

(n) 1 Sim. & St. 369.

SECTION V.

OF CERTAIN CASES IN WHICH AN INCUMBRANCER, ALTHOUGH HE HAS THE LAW ON HIS SIDE, MAY NOT HAVE ANY EQUITY.

OF mortgagees who, although they have the law on their side, may not have any equity, two kinds may in particular be mentioned. One who fraudulently conceals his own incumbrance; the other who fraudulently neglects his duty to take or keep the title deeds of the estate.

[*421] *1. If a mortgagee, who is seised or possessed of the legal estate, knows that a person is about to lend money on mortgage of the same property, and fraudulently conceals from that person his own incumbrance, such person may, in equity, postpone this incumbrance to his own mortgage. (o) On the same principle, equity will protect a purchaser against a concealed mortgage; (p) and also a purchaser, (q) or mortgagee, (r) against a misrepresented (s) or concealed settlement of the estate. In *Horlock v. Priestley*, there was in a particular manor no limited time for presenting surrenders made out of Court; and therefore it was decided, that fraudulent intention or concealment was imputable to a mortgagee, whose conditional surrender had not been enrolled, and who was not admitted, until after a subsequent surrender to another incumbrancer; and that, accordingly, as the mortgagee was seised of the legal estate, he was entitled to priority before the subsequent incumbrancer, although the latter advanced his money without notice of the mortgage. (t)

2. If a mortgagee, who is seised or possessed of the legal estate, fraudulently leaves the title deeds to that estate in the custody of the mortgagor, or, after their delivery to the mortgagee, fraudulently lends them to the mortgagor, a subsequent mortgagee, who, by such possession of the title deeds, is led to believe that the property is unincumbered, and therefore to advance his money, may in equity postpone the former mortgage to his own security. (u) It is not, however, a fraud, merely to leave the title deeds in the custody of the mortgagor, (v) or, after their delivery, merely to lend them to him. (w)

(o) *Clere's case*, cited 9 Mod. 38; *Clare v. Earl of Bedford*, apparently S. C., cited 2 Vern. 151; *Anon.*, perhaps S. C., cited Barn. Ch. Rep. 102; *Draper v. Borlace*, 2 Vern. 370; *Ibbotson v. Rhodes*, ib. 554; *Mocatta v. Murgatroyd*, 1 P. W. 393. See also *Beckett v. Cordley*, 1 Bro. C. C. 353.

(p) *Amy's case*, cited 2 Ch. Cas. 128, probably *Dr. Amyas' case*, cited 2 Vern. 151; *Anon.* 1 Freem. 310, Ca. 379; *Berrysford v. Millward*, Barn. Ch. Rep. 101, 2 Atk. 49.

(q) *Savage v. Foster*, 9 Mod. 35; *Hobbs v. Norton*, 1 Vern. 136, 2 Ch. Cas. 128; *Hunsden v. Cheyney*, 2 Vern. 150; *Raw v. Pote*, or *Potts*, ib. 239, Prec. Ch. 35; *Teasdale v. Teasdale*, Sel. Ca. Ch. 59, 2 Eq. Cas. Abr. 391.

(r) *Watts v. Crosswell*, 9 Vin. Abr. 415, 2 Eq. Cas. Abr. 515, Ca. 3; *Anon.*, before Lord Cowper, cited 1 Ves. 96. See also *Marquis Cholmondeley v. Lord Clinton*, 2 Mer. 313, 362.

(s) *Beverley v. Beverley*, 2 Vern. 131, 133; *Hunsden v. Cheyney*, ib. 150. See also *Arnot v. Biscoe*, 1 Ves. 95; *Pearson v. Morgan*, 2 Bro. C. C. 388; *Merewether v. Shaw*, 2 Cox, 124; and *Barret v. Wells*, Prec. Ch. 131.

(t) 2 Sim. 75.

(u) *Peter v. Russell*, 1 Eq. Cas. Abr. 321, Ca. 7, 2 Vern. 726; *Evans v. Bicknell*, 6 Ves. 192; *Clifford v. Brooke*, 13 Ves. 132.

(v) *Head v. Egerton*, 3 P. W. 290; *Plumb v. Fluitt*, 2 Anstr. 440; *Tourle v. Rand*, 2 Bro. C. C. 650. *Evans v. Bicknell*, 6 Ves. 190, 191; *Harper v. Faulder*, 4 Madd. 138; *Anon.* (29 July or January, 1802,) cited 4 Madd. 135, and 3 Russ. 39; *Barnett v. Weston*, 12 Ves. 130, 133. These authorities contradict the old doctrine expressed by the opinions of *Burnett, J.*, 1 Ves. 360, and *Buller, J.*, 1 Durn. & E. 762 See 6 Ves. 183, 194.

(w) *Peter v. Russell*, 1 Eq. Cas. Abr. 321,

But it is the duty of a mortgagee of the legal estate, to which possession of the title deeds is legally incident,(x) to take and keep the title deeds;(y) and although the mere leaving or lending them is not fraud, yet fraud will be constituted by the mortgagee's "gross neglect" or "gross negligence" in leaving or lending the deeds,(z) or by his "voluntary leaving" of them,(a) or by his "gross and voluntary negligence" in leaving them,(b) or, in leaving them, by his failure "to use reasonable diligence for his own protection;"(c) expressions which seem to mean a leaving or lending, accompanied by an unreasonable want of care to prevent injury or fraud to himself or others.

If a mortgagee of the legal estate innocently leaves the title deeds in the custody of the mortgagor, yet if afterwards a second mortgage is made, and the deeds are delivered to this mortgagee, a Court of Equity, although it will not postpone the first mortgagee, will not compel the second to give the title deeds up to him.(d)

If when a mortgage is made the mortgagee does not take or *require possession of the title deeds, his not taking or [*423] requiring possession of them at that time is not a fraud, and therefore he cannot on that ground be postponed, if at the time of his mortgage the possession of the title deeds was not legally incident to the estate conveyed to him in the property.(e) And with much stronger reason he cannot be postponed, if not only the custody of the title deeds is not legally incident to his estate, but the mortgage to him is made by trustees, in whom it would have been a breach of trust, "to have given to one incumbrancer those instruments, which they were bound to keep for the common security of all the persons advancing money upon the credit of their trust."(f)

SECTION VI.

OF TWO CASES, WHERE A SUBSEQUENT INCUMBRANCE ACQUIRED BY A MORTGAGEE MAY NOT BE ENTITLED TO PRIORITY.

IF a mortgagee of the legal estate acquires a subsequent mortgage, as executor of a mortgagee of the equity of redemption, or by assignment in trust for another person, it appears that, in either case, such a subsequent mortgage cannot be tacked to the legal estate, to the prejudice of intervening incumbrancers.(g) Here, it seems, although the equity of

Ca. 7, Gilb. Eq. Rep. 122, 2 Vern. 726, cited 6 Ves. 191; Martinez v. Cooper, 2 Russ. 198. See also *Ex parte Meux*, 1 Glyn & J. 116.

(x) 2 Bro. C. C. 652; 4 Madd. 138.

(y) 3 P. W. 281; 1 Durn. & E. 762, 772.

(z) *Peter v. Russell*, 1 Eq. Cas. Abr. 321, Ca. 7; *Tourle v. Rand*, 2 Bro. C. C. 652; *Evans v. Bicknell*, 6 Ves. 190, 191; *Martinez v. Cooper*, 2 Russ. 217.

(a) *Penner v. Jemmett*, or *Jemmett*, 2 Bro. C. C. 652, n., 1 Fonbl. Treat. Eq. 5th ed. 166, n.

(b) *Plumb v. Fluit*, 2 Anstr. 440.

(c) *Harper v. Faulder*, 4 Madd. 138.

(d) *Head v. Egerton*, 3 P. W. 280, cited 2 Ves. & B. 83; *Evans v. Bicknell*, 6 Ves. 191; *Anon.* (29 July or January, 1802,) cited 4 Madd. 135, and 3 Russ. 39; *Wiseman v. Westland*, 1 Y. & Jerv. 117.

(e) *Tourle v. Rand*, 2 Bro. C. C. 650; *Harper v. Faulder*, 4 Madd. 138.

(f) *Harper v. Faulder*, 4 Madd. 129.

(g) *Barnett v. Weston*, 12 Ves. 130; *Morret v. Paske*, 2 Atk. 53.

the testator, or *cestui que trust*, may be equal to that of the intervening incumbrancer, yet the mortgagee of the legal estate has not, in the consideration of a Court of Equity, an equity to stand on his legal title, and resist redemption, until payment not only of his own mortgage, but also that held by him as executor or trustee; and, therefore, after redemption of the mortgage of the legal estate, the rule *qui prior est tempore potior est jure* is applicable; and the intervening incumbrance is, under that rule, entitled to priority before the subsequent mortgage acquired in the character of executor or trustee.

[*424]

*CHAPTER XXXIII.

OF A MORTGAGEE'S WILL, DISPOSING OF THE MORTGAGED PROPERTY, OR MONEY SECURED BY IT.

SECT. I. *Of disposing of the Land contained in a Mortgage in Fee.*

II. *Of disposing of the Money secured by the like Mortgage.*

III. *Of a Mortgage for Years.*

IV. *Of the Interest of Mortgage Money.*

V. *Of a Mortgage, of which the Equity of Redemption is foreclosed.*

SECTION I.

OF DISPOSING OF THE LAND CONTAINED IN A MORTGAGE IN FEE.

So soon as the condition of redemption of a mortgage in fee of land is broken, the estate in fee is, with an exception presently to be noticed, at law the absolute property of the mortgagee. Yet in equity it continues to be redeemable, notwithstanding the forfeiture. It follows, that, after the condition is broken, the mortgagee sustains the two characters of absolute owner at law, and of mortgagee in equity. As absolute owner, the land and legal estate in fee in it are subject to the law, as distinguished from equity. As mortgagee, they are a pledge only, over which, and the mortgage money, a Court of Equity exercises a particular government.

At law, if the mortgagee makes a will, freehold land in mortgage will not pass by it, unless it is executed according to the *Statute [*425] of Frauds, 29 Charles II., c. 3.(a) But if so executed, it will at law pass by a will, wherein the mortgagee devises "all his estate in such [the particular] land," or mentions that he has such land mortgaged in fee, and devises his "mortgage."(b) In *Crips v. Grysil*, a

(a) 2 Atk. 272.

Cro. Car. 447, 449, 450, 1 Rol. Abr. 834,

(b) *Wilkinson v. Merryland*, or *Meream*, 835, pl. 15, 16, W. Jones, 380.

Court of Law decided on a will made by a mortgagee in fee before the mortgage was forfeited, that the particular words of the will, wherein the testator said, "The rest of my goods not bequeathed, my money, bills or bonds, mortgages or specialties for money, I do give unto R. K. my son, and do make him my full and sole executor, yea, and also my heir of this freehold," made a good devise of the lands mortgaged.^(c) In *Silberschildt v. Schiott*, which arose on the will of a person who had been mortgagee in fee, and who had obtained a decree of foreclosure, Sir W. Grant made this observation—The testator seems "not very well to have understood the effect of a foreclosure; and still continues to describe as a mortgage the interest he had. If his interest had been really such, there is no doubt a gift of the money would have carried his interest in the land upon which it was secured."^(d) By these words, Sir W. Grant has been understood to mean in an unqualified manner to say, that the will of a mortgagee "disposing of the money, carries his interest in the land." On a careful examination, however, of the whole of the judgment, in which the passage mentioned is found, there seems to be reason to suppose that he intended to say merely, that, in the particular case, where the testator spoke of his interest "sometimes as money, sometimes as land, sometimes of the farms as representing the money, sometimes of the money as representing the farms," the context of the will would have made the gift of the money carry the land and the fee simple in it, had the mortgage not been foreclosed when the will was executed. In *Renvoize v. Cooper*, W. T., after certain devises of his real estate, gave all the residue of his freehold lands, tenements, "and hereditaments, whatsoever and wheresoever, to [*426] his wife, her heirs and assigns, to sell and dispose of as she pleased. And after certain legacies, "as to all the residue of his estates, book-debts, bills, bonds, mortgages, and other securities for money, funded property, and effects, whatsoever and wheresoever," he bequeathed the same to his wife. Certain estates were mortgaged in fee to the testator, and forfeited before the will was made; and the legal estate in fee was, by Sir John Leach, held to pass under the latter clause in the will. "It may be," he said, "that the mortgaged fee will not pass to the wife by the residuary devise of the freehold estate, because, having no mortgage for years, the subsequent gift of mortgages to the wife marks this testator's intention that it should not pass by that devise. But if this be so, I am of opinion that the mortgaged fee will pass to the wife by the subsequent gift of mortgages, and other securities for money, though coupled with personal property. In substance, money secured by a mortgage in fee is personal property, and a gift of a mortgage security for money is a gift of all the testator's interest in the money and security, and will therefore pass the fee."^(e) In *Galliers v. Moss*, a mortgagee in fee by his will bequeathed in the words,—“I give all my stock in trade, cotton-mill, machinery, cupola-furnace, mineral-tools, implements, and utensils, ready money, and securities for money, debts, personal estate and effects of what nature and kind soever and wheresoever, unto J. T., T. S., and J. A., their executors, administrators, and assigns,” upon trust to “sell

(c) Cro. Car. 37, and stated, from the record of the special verdict, in *Galliers v. Moss*, 9 Barn. & C. 282.

(d) 3 Ves. & B. 49. See *Martin v. Mowlin*, 2 Burr. 969.

(e) 6 Madd. 371.

any said stock in trade, cotton-mill, machinery, cupola-furnace, mineral tools, implements and utensils, personal estate and effects, and collect in, and receive all such sum and sums of money as shall be owing to me at the time of my death, and lay out the same in the purchase of freehold lands," &c., which the testator directed to be conveyed to certain uses. The Court of King's Bench decided; that, by this clause of the will, the mortgaged lands or legal estate did not pass, because the words used "are not adequate to the passing of such property."(*f*)

[*427] "The exception, which before has been alluded to, is, that even at law the mortgagee is now, in some cases, considered to be a trustee. For notwithstanding the different opinion of Lord Hardwicke, and a decision by him accordingly, (*g*) a Court of Equity has in several later cases held, what is clearly the present law on the subject, that at law the lands contained in a forfeited mortgage in fee will *not* pass by general words of description of land, as—"all the rest, residue, and remainder of my estate and effects, whatsoever and wheresoever:"(*h*) or, "all and singular my messuages, tenements, lands, hereditaments, and premises, and all my real estate, of what nature, kind, or quality soever, and wheresoever the same are situate:"(*i*) or, "all the rest and residue of my freehold, leasehold, and copyhold estates, which I may be seised of at the time of my decease, either in possession or reversion, together with all and singular my goods, chattels, monies, bonds, mortgages, and debts, which may be owing to me at the time of my decease:"(*j*) or, "all other my freehold, copyhold, leasehold, and other messuages, lands, and tenements, and all and singular my money, securities for money, and all other my estate and effects, whatsoever:"(*k*) or, "all and singular my real and personal estate, of whatever kind and sort, situate in the county of S., or elsewhere in Great Britain, that I shall be seised of or entitled unto at the time of my decease:"(*l*) or, "all the rest, residue, and remainder of and in all and singular the property, estate, and effects, which I shall be possessed of, or entitled to, or over which I shall have a disposing power, at the time of my decease, of what nature or kind soever the same may be;"(*m*)—used in the will of the mortgagee, if the disposition made is inconsistent with property, which is not beneficially his own, (*n*) or, as it is expressed, "inconsistent with the disposition of that which is not his own,"(*o*) or, "inconsistent with the nature of trust property;"(*p*) as where such inconsistency appears by limitations in strict settlement:(*q*) or by the creation of certain trusts on the lands so generally devised:(*r*) or by a bequest of an annuity out of the lands so devised:(*s*) or by a charge of debts, and an annuity on the lands so devised, and a bequest of the mort-

(*f*) 9 Barn. & C. 267; 4 Mann. & Ryl. Ves. 276; Wall v. Bright, 1 Jac. & W. 498; and Harrison's case, 3 Anstr. 836.

(*g*) *Ex parte* Bowes, 1 Atk. ed. Sand. 605, n., cited 3 Ves. 349.

(*h*) 3 Ves. 348.

(*i*) 10 Ves. 101.

(*j*) 10 Price, 78.

(*k*) *Ibid.*

(*l*) 10 Price, 78.

(*m*) M'Clel. & Y. 293.

(*n*) See Attorney General v. Vigor, 8

(*o*) 10 Ves. 103.

(*p*) 1 Jac. & W. 498.

(*q*) Thompson v. Grant, 4 Madd. 438.

(*r*) Silvester v. Jarman, 10 Price, 78, 87, on the wills of James and John Bond; Horsfall's case, M'Clel. & Y. 292.

(*s*) Winn v. Littleton, 1 Vern. 3, 2 Ventr. 351, 2 Ch. Cas. 51; *Ex parte* Morgan, 10 Ves. 101.

gage money, upon certain trusts;(*t*) or by a charge of debts, legacies, annuities, and funeral expenses.(*u*) In the *Duke of Leeds v. Munday*, *Ex parte Morgan*, and *Ex parte Horsfall*, where a Court of Equity held the mortgaged lands did not pass by the general words in the will, the Court determined the legal estate to be descended to the mortgagee's infant heir at law, who might be directed to convey that estate under the statute 7 Anne, c. 19. It has, moreover, been in a late case decided by a Court of Law, that the lands contained in a forfeited mortgage in fee will not pass by general words of description of land, as, "all my messuages, lands, tenements, hereditaments, and estate," if the lands are limited "to uses not applicable to mortgage property."*(v)*

In late cases a Court of Equity has expressed an opinion, that lands contained in a forfeited mortgage in fee will at law pass under the mortgagee's will, wherein he devises land by general words of description, if the disposition made is not inconsistent with property, that is not beneficially his own.*(w)* And the same opinion seems also to have been expressed by a Court of *Law.*(x)* When a Court of Equity [*429] holds that, by such a devise, the land, that is, the legal estate, passes at law, it appears at the same time to decide that, by that devise, the land, or legal estate, passes in equity also. In *Casborne*, or *Inglis*, v. *Scarfe*, Lord Hardwicke seems to have expressed a different opinion,*(y)* although it has been doubted if the dictum there imputed to him is correctly reported.*(z)* But the context of that dictum furnishes strong evidence, that Lord Hardwicke spoke of the legal estate, and did not refer to the mortgage money or beneficial estate only, and meant to draw a distinction between law and equity, and to say, that, by general words, the legal estate would not in a Court of Equity pass. By, however, a case which occurred a few years after, it appears his Lordship had then changed his opinion, for he here held, that, in a Court of Equity, the legal estate passed by general words contained in a devise to uses, under which the legal estate became vested in an infant tenant in tail, whom he directed to convey under the statute 7 Anne, c. 19.*(a)*

It appears to be clear, that when a mortgagee in fee devises land by general words, as, "my lands and tenements," or, "my real estates," and the devise is not inconsistent with property, which is not the mortgagee's own, the mortgaged lands will, both at law and in equity, pass to the devisee, although the testator has other lands, which might satisfy the words of the will.*(b)*

(*t*) *Duke of Leeds v. Munday*, 3 Ves. 348, 5 Ves. 341, n., cited 8 Ves. 433.

(*u*) *Silvester v. Jarman*, 10 Price, 78, 85, cited 9 Barn. & C. 278, 281.

(*v*) *Galliers v. Moss*, 9 Barn. & C. 267, 281, 282, 4 Mann. & Ryl. 268. That the legal estate of a trustee will not, in the like cases, pass by words of general description is decided by a Court of Law in *Roe v. Reade*, 8 Durn. & E. 118, and by a Court of Equity in *Lord Braybroke v. Inskip*, 8 Ves. 417, and *Ex parte Morgan*, 10 Ves. 101, on the second will there. See also 1 Jac. & W. 498, and 10 Price, 85.

(*w*) *Ex parte Sergison*, 4 Ves. 147, cited 8 Ves. 432; *Lord Braybroke v. Inskip*, 8

Ves. 435; *Ex parte Whitacre*, 1 Sand. Uses, 3rd ed. 285; *Wall v. Bright*, 1 Jac. & W. 498; *Silvester v. Jarman*, 10 Price, 85. See also *Attorney General v. Vigor*, 8 Ves. 276; and *Renvoize v. Cooper*, 6 Madd. 371.

(*x*) *Galliers v. Moss*, 9 Barn. & C. 278, 280.

(*y*) 1 Atk. 605; 1 West Cas. T. Hardw. 225; 2 Jac. & W. 194; 7 Vin. Abr. 156.

(*z*) 8 Ves. 437.

(*a*) *Ex parte Bowes*, 1 Atk. ed. Sand. 605, n.

(*b*) *Littleton's case*, 2 Ventr. 351; *Marlow v. Smith*, 2 P. W. 198; *Lord Braybroke v. Inskip*, 8 Ves. 417, 421, 432. See,

It may here lastly be mentioned, that a Court of Equity holds, "a testator may, if he pleases, give by his will all his interest in mortgages, to which he may be entitled at the time of his death, because a mortgage is in substance a chattel interest."^(c)

[*430]

*SECTION II.

OF DISPOSING OF THE MONEY SECURED BY A MORTGAGE IN FEE.

It may, it seems, be stated, that money secured by a forfeited mortgage in fee may pass by the will of the mortgagee, although this will is not executed according to the Statute of Frauds, 29 Charles II., c. 3, but is sufficient to bequeath personal property;^(d) that it may pass by a bequest of all his personal estate,^(e) or all his mortgages,^(f) or all his mortgages and other securities for money,^(g) or by the phrase, money due on mortgage.^(h) And it appears farther, that if the land in mortgage is devised by its own exclusive description, or by the description of land in a place where the testator has not any other land, this devise of the land will certainly, if, at the time when the will is made, the mortgagee is in possession, and probably if he is not, entitle the devisee to the money secured by the mortgage.⁽ⁱ⁾

SECTION III.

OF A MORTGAGE FOR YEARS.

If a mortgagee of a term of years after forfeiture of the mortgage makes his will, and therein says, I give "all my mortgages" to A., a Court of Equity holds, that by those words, the legal estate may pass, and the legatee be entitled to the mortgage money.^(j)

[*431] *On a question, if the legal estate of a mortgagee for years passes by a general description of land, as "lands and tenements," devised by the mortgagee, the Rule in *Rose v. Bartlett* must not be forgotten. This rule is, "If a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the lease for years; and if a man hath a lease for years,

nevertheless, *Chester v. Chester*, 3 P. W. 62.

(c) 4 Madd. 447. See also 2 Bos. & P. 314.

(d) 2 Burr. 978.

(e) *Martin v. Mowlin*, 2 Burr. 969, cited 5 Durn. & E. 655.

(f) *Attorney General v. Meyrick*, 2 Ves. 46; *Renvoize v. Cooper*, 6 Madd. 373.

(g) *Renvoize v. Cooper*, 6 Madd. 373.

(h) *Attorney General v. Meyrick*, 2 Ves. 46.

(i) *How v. Vigures*, 1 Ch. Rep. 32; *Clarke v. Abbot*, Barn. Ch. Rep. 457, 461; 2 Eq. Cas. Abr. 606; *Woodhouse v. Meredith*, 1 Mer. 450. See *Knollys v. Shepherd*, cited 1 Jac. & W. 499.

(j) *Davis v. Gibbs*, 3 P. W. 26, Mos. 269, 278, Fitzg. 116, cited 2 Bos. & P. 314, and 1 Mer. 457; *Attorney General v. Meyrick*, 2 Ves. 46; *Renvoize v. Cooper*, 6 Madd. 373.

and no fee simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be utterly void.”(k)

SECTION IV.

OF THE INTEREST OF MORTGAGE MONEY.

ON the intention found in the following wills, a bequest of the principal of mortgage money was held not to carry the interest; and of “ar-rears of my mortgage” not to carry the principal. O. R. by his will said, “I give to T. R. 300*l.*, which I have at interest, secured by a mortgage on the estate of M.; and also I give him all the messuages, lands, and tenements secured for the payment of that money, till the same be paid and discharged.” Lord Hardwicke decided, that only the principal sum contained in the mortgage passed by this will, and that the interest due at the testator’s death did not pass by it.(l) A person having a mortgage upon an estate, of which her brother was tenant for life, and having also his bond for 120*l.*, arrears of interest upon that mortgage, made this disposition in her will,—“I give to my brother L. the arrears of my mortgage upon his estate; likewise a bond from him in my possession, to be delivered to him.” Lord Loughborough said, the testatrix “could not have spoken more clearly. The arrears of a mortgage does not mean the mortgage itself, but what may be then due for interest; in a will, what may be due at the death.”(m)

*SECTION V.

[*432]

OF A MORTGAGE, OF WHICH THE EQUITY OF REDEMPTION IS FORECLOSED.

IF, while the equity of redemption exists, a mortgagee in fee of land makes his will, and thereby devises the land in mortgage, a Court of Equity holds, that such devise of the land is a gift of only a security for money; and that if, after the will is executed, the testator acquires by foreclosure the absolute estate in fee, this acquisition is like a new purchase of land, which cannot pass by a will made before it was bought.(n) The consequence is, that, in a Court of Equity, the devise of the mortgaged land is, by the foreclosure, revoked, and will not entitle the devisee to it, unless the will is afterwards republished. And if it is not republished, the devisee, to whom at law the legal estate is given by the

(k) Cro. Car. 292. On this rule, see, in particular, Lord Eldon’s elaborate judgment in *Thompson v. Lawley*, 2 Bos. & P. 308.

(l) *Roberts v. Kyffin*, or *Kuffin*, Barn. Ch. Rep. 259, 2 Atk. 112.

(m) *Hamilton v. Lloyd*, 2 Ves. jun. 416.

(n) Unless the will is republished (*Barnes v. Crowe*, 1 Ves. jun. 486,) land bought, or acquired, as by devise or descent, after a

will is made, will not pass by it, although the terms of the will clearly express this intention; as, if the testator says, “I devise and bequeath all my estate, both real and personal, which I shall die possessed of, interested in, or entitled unto.” *Thellusson v. Woodford*, 13 Ves. 209; *Back v. Kett*, Jacob, 534; *Churchman v. Ireland*, 1 Russ. and M. 250.

will, will in equity be a trustee for the heir at law of the testator. (o) In *Attorney General v. Vigor*, lands, that had been mortgaged, were by a Court of Equity held to pass under a will, on the ground of presumption, that, before the execution of the will, a release of the equity of redemption had been obtained. (p) In *Silberschildt v. Schiott*, where a will was made after a decree of foreclosure of a mortgage in fee, it appears the lands, that were contained in the mortgage, were, on the intention to be collected from the whole will, held to pass under a bequest of the money secured by the mortgage. (q)

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*CHAPTER XXXIV.

OF THE STATUTE OF LIMITATIONS, 21 JAMES I., c. 16.

SECT. I. *Certain enactments of the Statute.*II. *Of the Time from which the Statute runs.*III. *Of an Executor's commencing a new Action under Section IV. of the Statute.*IV. *Of an acknowledgment of, and Promise to Pay, a Debt; and of the Statute 9 George IV., c. 14, called Lord Tenterden's Act.*V. *Of the Power of an Executor to revive a Debt barred by the Statute.*VI. *Of the Power of an Executor to waive the Protection of the Statute.*VII. *Of the Effect of the Statute in certain cases of Trust.*VIII. *Of Cases, where the Statute has become a Bar pending a Suit in Equity.*

SECTION I.

CERTAIN ENACTMENTS OF THE STATUTE.

THE statute 21 James I., c. 16, enacts by

Section III. That all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt, grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, shall be commenced and sued within six years next after the cause of such actions or suit, and not after.

Sect. IV. That if, in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict

(o) *Strode, or Litton, v. Falkland*, or *Russell*, 3 Ch. Rep. 169, 186, 187, 188, 2 Vern. 621, 625; *Casburne v. Inglis*, or *Scarfe*, 1 West Cas. T. Hardw. 226, 227, 1 Atk. 606, 2 Jac. and W. 194; *Thompson v. Grant*, 4 Madd. 438.

(p) 8 Ves. 273—278, 288; *Attorney General v. Bowyer*, S. C., 3 Ves. 725, 730, 5 Ves. 303.

(q) 3 Ves. and B. 45.

pass for the plaintiff, and, upon matter alleged *in arrest of judgment, the judgment be given against the plaintiff, that he [*434] take nothing by his plaint, writ, or bill, or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that in all such cases the party, plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

Sect. VII. That if any person or persons, that is or shall be entitled to any such actions of account, or actions of debts, be or shall be, at the time of any such cause of action given, or accrued, fallen, or come, within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons, having no such impediment, should have done.

SECTION II.

OF THE TIME FROM WHICH THE STATUTE RUNS.

To sustain an action under the third section of the statute, it must be commenced within six years next after the cause of the action. And, in consequence, the time when the cause of action arose, marks the period from which the six years began to run. (a) Therefore, if the cause of action is a breach of contract, the six years will begin to run from the time when the contract was broken. (b) In an action by executors on several promises, all laid to be made to the testator in his life-time, and where the defendant pleaded *non assumpsit infra sex annos*, and the plaintiffs *replied that within six years they [*435] obtained probate, by which the action accrued to them within that period, the Court decided that the replication was not good, "for the time of limitations must be computed from the time, when the action first accrued to the testator, and not from the time of proving the will. The proving of the will gave no new cause of action, and therefore the time of proving the will is perfectly immaterial." (c)

The 19th section of the statute 4 Anne, c. 16, enacts—That if any person or persons, against whom there shall be any cause of action upon the case, or of debt grounded upon any lending or contract without specialty, be or shall be, at the time of any such cause of action given or accrued, fallen or come, beyond the seas, that then such person or persons, who is or shall be entitled to any such action, shall be at liberty to bring the said actions against such person and persons, after their return

(a) *Webb v. Martin*, 1 Lev. 48; *Hickman v. Walker*, Willes, 27; *Wittersheim v. Countess of Carlisle*, 1 H. Bl. 681; *Holmes v. Kerison*, 2 Taunt. 323.

(b) *Battley v. Faulkner*, 3 Barn. & Ald.

288; *Short v. McCarthy*, ib. 626; *Howell v. Young*, 5 Barn. & C. 259; *Brown v. Howard*, 2 Brod. & B. 73.

(c) *Hickman v. Walker*, Willes, 27, cited 3 Bing. 641.

from beyond the seas, so as they take the same, after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions, by the Act, 21 James I., c. 16.(d)

An interpretation of great importance put on the statute, 21 James I., c. 16, is, that, to make the six years commence from the cause of the action, there must, when such cause arises, be a person in existence capable of suing; a Court of Law holding, that "it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing."(e) And, accordingly, where a bill of exchange was drawn on the 20th January, 1809, payable to W. H. three months after sight, and directed to the East India Company, and was accepted from the 20th July, 1809; and on the 14th March in that year, W. H. was drowned, and, there being no executor named in his will, administration with the will annexed was, on the 13th February, 1812, granted to J. M., and an action on the bill was commenced on the 27th August, 1816; and, on these facts, the question arose, whether the time of limitation began to [*436] run from the date of the *defendant's acceptance, or the day of payment, at which time there was no person in existence, who could acquire a right of action by the acceptance and non-payment, or from the date of the administration, whereby a person was brought into existence, who might acquire a right of action by the non-payment; the Court of King's Bench decided, that the time of limitation did not begin to run until the grant of the administration.(f) And a farther interpretation put on the statute is, that although an injury complained of has existed more than six years, yet there is no cause of action, until there is some person within the realm against whom the action can be brought. "Cause of action is the right to prosecute an action with effect; no one has a complete cause of action, until there is somebody that he can sue."(g) And, therefore, in a case where, when a cause of action arose against H., he was in India, whence he never returned to England, but in the year 1817 died in India, having made his will, and appointed F. his executor, and F. did not prove the will, or in any way act as executor, until 1824, and in an action against F. he pleaded the Statute of Limitations, it was determined that this plea was not a bar to the action, it being brought within six years next after F. took upon himself the execution of the will.(h) If an executor, before he takes out probate, acts as executor, then he may be sued before probate.(i) And accordingly, in a case where W. W., indebted to T. W., died in 1786, and the person appointed the executor of W. W. proved his will in 1802, but previously to 1792 possessed himself of the estate and effects of the testator, and by so doing acted as executor, and after six years from the time the executor so acted, a bill was filed in equity for payment of the debt, the Court allowed the plea of the Statute of Limitations put in by the executor.(j)

[*437] In Wells v. Horton, a person who was applied to for a debt *owing by him, in consideration that the plaintiff would for-

(d) On this enactment, see Williams v. Jones, 13 East, 439.

(e) 5 Barn. & Ald. 214.

(f) Murray v. The East India Company, 5 Barn. & Ald. 204. See also Pratt v. Swaine, 8 Barn. & C. 285.

(g) 4 Bing. 704.

(h) Douglas v. Forrest, 4 Bing. 686, 1 Moore & P. 663. See also Jolliffe v. Pitt, 2 Vern. 694.

(i) 4 Bing. 704.

(j) Webster v. Webster, 10 Ves. 93, cited 4 Bing. 705.

bear to proceed against him for the recovery of the money during his, the debtor's life-time, verbally undertook and promised the plaintiff, that his executor should, after his decease, pay to the plaintiff the money. Best, Ch. J., ruled, that to this case the Statute of Limitations did not apply, as the undertaking was to do something on a certain event, which event had occurred within the six years. And the same case was, by the Court of Common Pleas, held not to be within the fourth section of the Statute of Frauds, 29 Charles II., c. 3.(*k*)

SECTION III.

OF AN EXECUTOR'S COMMENCING A NEW ACTION UNDER SECTION IV. OF THE STATUTE.

IF, before the expiration of six years next after the cause of action, a testator himself sues at law to recover a debt, and dies before judgment, and, at or after his death, the six years are expired, then, upon the equity of the fourth section of the statute, 21 James I., c. 16, his executor may bring a new action against the debtor.(*l*) But within what time after the death of the testator, the executor must, to come within the statute, commence his action, appears to be a point that remains undecided.(*m*) A learned writer expresses an opinion, that "the statute is the best guide upon the subject, and as that provides that a new action, in the cases enumerated in it, must be commenced within a year, so an executor ought also to bring a new action within that period." And he farther states, that "it seems prudent for the executor to bring a new action as soon he possibly can after the death of his testator, and at all events not to delay it beyond a year."(*n*)

*SECTION IV.

[*438]

OF AN ACKNOWLEDGMENT OF, AND PROMISE TO PAY, A DEBT; AND OF THE STATUTE 9 GEORGE IV., C. 14, CALLED LORD TENTERDEN'S ACT.

CERTAIN general constructions, which, with reference to a debt, and an action of assumpsit(*o*) to recover it, have been put on the Statute of Limitations, are, that the statute does not destroy or bar the debt, but the remedy only;(*p*) that when the statute is a bar, it is a bar on the sup-

(*k*) 2 Car. & P. 383, 4 Bing. 40. See also *Fenton v. Emblers*, 3 Burr. 1278, 1 W. Bl. 353.

(*l*) 2 Salk. 425; *Willes*, 29.

(*m*) *Kinsey v. Heyward*, 1 Lord Raym. 432, 1 Lutw. 256; *Hayward v. Kinsey*, 12 Mod. 568; *Wilcocks v. Huggins*, 2 Stra. 907, Fitzg. 170, 15 Vin. Abr. 103, in marg., 1 Eq. Cas. Abr. 305, in marg.; *Lethbridge v. Chapman*, 15 Vin. Abr. 103, in marg.; *Car-*

ver, or Cawer, v. James, Willes, 255, Bull. N. P. 147. See also *Willes*, 29, and *Selw. N. P.* 6th ed. 161, n.

(*n*) Note by Mr. Serj. Williams to *Hodden v. Harridge*, 2 Saund. 5th ed. 63 g., 63 h.

(*o*) See 1 Barn. & Ald. 93; 6 Barn. & C. 605, 606; and 3 Bing. 331, 640.

(*p*) 5 Burr. 2630; 2 W. Bl. 703; 13 East, 450, 451; 15 Ves. 491, 492; 1 Sim. 372.

position, or presumption, that the debt has been paid, and the vouchers, or evidence of payment, lost; *(g)* that, consequently, such presumption may be rebutted, and that, when rebutted, the bar does not arise; *(r)* that if, either before *(s)* or after *(t)* the expiration of six years from the cause of action, the debtor acknowledges the debt is owing, this acknowledgment rebuts the presumption mentioned, and prevents the bar, or, as it is expressed, takes the case out of the statute; *(u)* and that the legal effect of the acknowledgment is, to raise a new or fresh promise to pay the debt, the law implying such new promise, when an acknowledgment of the debt is proved. *(v)* And formerly the acknowledgment was construed to imply an absolute and unconditional new promise to pay, although at the time it was made, the debtor, in express terms, sheltered himself under the statute, and refused to pay; *(w)* or [*439] qualified his acknowledgment *by expressing his inability to pay. *(x)* But, according to the doctrine contained in later cases, the Courts will not, from an acknowledgment that the debt is owing, imply a new promise to pay, if the terms of such acknowledgment, as when it is accompanied by a refusal to pay, directly repel the inference of that promise. *(y)* And an absolute and unconditional new promise to pay will not now be implied, if the acknowledgment is qualified by a promise to pay when of ability to do it. *(z)*

As the statute bars the remedy, not the debt, a creditor may have a right to the satisfaction of his demand out of money or property on which he has a lien, and by means of this lien may recover his debt, notwithstanding his remedy by action is barred by the statute. *(a)*

Words, which do or do not amount to an acknowledgment sufficient to take a case out of the statute, necessarily vary with the particular circumstances of each case. Several instances occur, wherein certain expressions used have been held not to constitute such an acknowledgment; *(b)* as where the words made use of were,—"I owe you not a farthing, for it is more than six years since;" *(c)* and, in another case, "I thought I had paid it at the time, but I have been in so much trouble since that time, that I really do not recollect it." *(d)* And the instances

(g) 5 M. & S. 75, 76; 1 Barn. & Ald. 693; 3 Barn. & Ald. 142, 295, 296; 2 Barn. & C. 154; 6 Barn. & C. 604. See also 4 M. & S. 461; 3 Bing. 332, 652; 15 Ves. 492; 2 Ves. & B. 290.

(r) 2 Bing. 308; 6 Barn. & C. 604.

(s) Mountstephen v. Brooke, 3 Barn. and Ald. 141; Frost v. Bengough, 1 Bing. 266. See Scales v. Jacob, 3 Bing. 638.

(t) Rucker v. Hannay, 4 East, 604, n.

(u) 16 East, 423; 5 M. and S. 75, 76; 3 Barn. and Ald. 142; 2 Barn. and C. 154, 157; 2 Bing. 308.

(v) 1 Barn. and Ald. 93; 2 Barn. and Ald. 761; 3 Barn. and Ald. 142; 1 Barn. and C. 250; 2 Barn. and C. 157; 6 Barn. and C. 606; 6 Taunt. 211; 3 Bing. 332.

(w) Bryan v. Horseman, 4 East, 599, cited 4 M. and S. 469, 461, 4 Taunt. 614, and 1 Bing. 267; Leaper v. Tatton, 16 East, 420; Dowthwaite v. Tibbut, 5 M. & S. 75.—2 Barn. & Ald. 761, 762; 2 Barn. & C. 154; 6 Barn. & C. 604; 3 Bing. 651.

(x) Leaper v. Tatton, 16 East, 420.

(y) A'Court v. Cross, 3 Bing. 329, cited 6 Barn. & C. 610, and 9 Dowl. & Ryl. 556; Brydges v. Plumptre, 9 Dowl. & Ryl. 746. See also 8 Bing. 42.

(z) Tanner v. Smart, 6 Barn. & C. 603, 9 Dowl. & Ryl. 549, cited 9 Dowl. & Ryl. 747; Ayton v. Bolt, 4 Bing. 105; Fearn v. Lewis, 6 Bing. 349; Haydon v. Williams, 7 Bing. 163. See Scales v. Jacob, 3 Bing. 638.

(a) Spears v. Hartly, 3 Esp. 61; Higgins v. Scott, 2 Barn. & Adol. 413.

(b) Rowcroft v. Lomas, 4 M. & S. 457; Swann v. Sowell, 2 Barn. and Ald. 759; Fearn v. Lewis, 6 Bing. 349; Snook v. Mears, 5 Price, 636. See Bicknell v. Kerpell, 1 Bos. and P. N. Rep. 20, and Collyer v. Willock, 4 Bing. 313.

(c) Coltman v. Marsh, 3 Taunt. 380.

(d) Hellings v. Shaw, 7 Taunt. 608. On certain propositions laid down in this case by Gibbs, Ch. J., see 4 Barn. and Ald. 571, and 3 Bing. 651.

are many, in which particular expressions have been held to amount to that acknowledgment, and consequently to take the case, in which they were used, out of the statute.(e)

*A case may be taken out of the statute by an acknowledgment made after the commencement of an action brought [440] to recover the debt,(f) or by an acknowledgment made to a third person.(g)

In *Tanner v. Smart*, which was assumpsit upon a promissory note, the promises in the declaration were absolute and unconditional, to pay when thereunto afterwards requested. The defendant pleaded *actio non accrevit infra sex annos*, upon which plea issue was joined. At the trial, the plaintiff proved that the note was produced to the defendant, and payment of it demanded, and that the defendant said, "I cannot pay the debt at present, but I will pay it as soon as I can." There was no proof, however, of any ability on the part of the defendant to pay the debt. A verdict having been given for the plaintiff, a rule *Nisi* for a new trial was obtained; and this rule was made absolute, the Court being of opinion, that, as there was no evidence of ability to pay, so as to raise that, which, in its terms, was a qualified promise, into one that was absolute and unqualified, there was not any promise which would support the promises in the declaration.(h) A similar decision has since been made in *Haydon v. Williams*, where a written promise, contained in a letter, so closely corresponded with the parol promise in *Tanner v. Smart*, that the Court held themselves governed, in the construction of it, by the decision in that case.(i)

If, in assumpsit by an executor upon a promise to his testator, the defendant pleads *non assumpsit infra sex annos* to the testator, and upon evidence it appears, that, after the death of the testator, and after six years elapsed from the time of the contract, the defendant owned the debt to the executor, and promised to pay *it, this evidence [*441] will not maintain the issue, the promise being made to the [*441] executor, and no promise being made to the testator within six years.(j) In an action by an executrix, the declaration averred only promises to pay the testator. The defendant having pleaded the Statute of Limitations, the only evidence to take the case out of the statute was a note without date, written by the defendant to the executrix, in which the defendant said, "The testator always promised not to distress me for it." And this evidence, it was held, did not sustain the issue, it not proving any promise made by the defendant within six years to pay the testa-

(e) *Heylin, or Heyling, or Hyleing, v. Hastings*, 1 Salk. 29, 1 Lord Raym. 389, 421, 12 Mod. 223, Com. 54, cited 6 Barn. and C. 606; *Rucker v. Hannay*, 4 East, 604, n.; *Gibbons v. McCasland*, 1 Barn. and Ald. 690; *Frost v. Bengough*, 1 Bing. 266; *Colledge v. Horn*, 3 Bing. 119; *Rendell v. Carpenter*, 2 Y. and J. 484; *Baillie v. Sibbald*, 15 Ves. 185. See also *Lloyd v. Maund*, 2 Durn. and E. 760; and *Bicknell v. Koppel*, 1 Bos. and P. N. Rep. 20.

(f) *Yea v. Fouraker*, 2 Burr. 1099.

(g) *Mountstephen v. Brooke*, 3 Barn. and Ald. 141; *Clark v. Hougham*, 2 Barn. and C. 149; *Colledge v. Horn*, 3 Bing. 119.

(h) 6 Barn. and C. 603, 9 Dowl. and Ryl. 549, cited 9 Dowl. and Ryl. 747, and 7 Bing. 167. See *Scales v. Jacob*, 3 Bing. 638.

(i) 7 Bing. 163.

(j) *Green, or Dean, v. Crane*, 2 Lord Raym. 1101, 6 Mod. 309, 11 Mod. 37, 1 Salk. 28, cited 1 Barn. and C. 250; *Sarell v. Wine*, 3 East, 409, S. P. on assumpsit by an administrator. *Manton, or Munton, v. Sculthorpe*, Trin. 1818, cited 1 Barn. and C. 252, 6 Barn. and C. 608, 9 Dowl. and Ryl. 554, S. P. See also *Hickman v. Walker*, Willes, 27; and *Pittam v. Foster*, 1 Barn. and C. 248, cited 6 Barn. and C. 608.

tor.(k) Perham v. Raynal was an action against R., F., and M., as the joint makers of a promissory note. They pleaded the Statute of Limitations. M., it appeared, was only a surety, and had made no acknowledgment of the debt within six years; but an acknowledgment by one of the other defendants within that time was proved. And it was decided, that this acknowledgment by one party only of the joint debt bound the others, and prevented the operation of the Statute of Limitations.(l) In Whitcomb v. Whiting, W. and three others entered into a joint and several promissory note, and in an action against W. alone, he pleaded *non assumpsit infra sex annos*. And the plaintiff having proved payment, by one of the others, of interest on the note, and part of the principal, within six years, this payment by one was decided to be an admission by all of the debt, and sufficient to take the case out of the statute.(m) This case has been followed in Jackson v. Fairbank, which was an action against W. F. on a joint and several promissory note, made by him and J. F. J. F. became a bankrupt, and the plaintiff received several dividends under the commission, in respect of the money secured by the [*442] note. And *the Court were clearly of opinion, that the payment of a dividend within six years was such an acknowledgment of the debt, as took the case out of the statute.(n) The two last mentioned cases governed the decision in Burleigh v. Stott, which was an action by the executors of R. B. against the administratrix of T. S., on a joint and several promissory note made by T. B. and T. S. (as the surety of T. B.) to R. B. The plaintiffs proved payment by T. B. to R. B. of interest on the note, and part of the principal, in the life-time of T. S., and within six years before the action brought. And it was decided the plaintiffs were entitled to recover; the Court being of opinion, that a part payment by one was an admission by both that the note was unsatisfied, and that it operated as a promise by both to pay according to the nature of the instrument, and, consequently, as a promise by the defendant's intestate to pay on this his several promissory note.(o) By later cases also it is established, that the payment of interest, by one of joint promisors in a promissory note, takes the case out of the Statute of Limitations as to all.(p) Atkins v. Tredgold was an action of assumpsit by the executors of J. A. against R. T. and others, executors of J. T.; the action being brought on three promissory notes, by which J. T. and the said R. T. jointly or severally promised to pay to J. A. the several sums therein mentioned. The declaration stated, that the defendants, as executors, promised payment to J. A. The defendants, the executors, pleaded that they did not promise, and, farther, that they did not, within six years, promise; on each of which pleas issue was joined. J. T. died in 1810. R. T. continued to pay interest on the notes after the death of J. T., and the last payment made by R. T. was in May, 1816; and it appeared by his books produced in evidence, that those payments were made by him out of his private estate, on his own

(k) Ward v. Hunter, 6 Taunt. 210, cited 1 Barn. and C. 251.

(l) 2 Bing. 306. See also 8 Barn. and C. 40, 41.

(m) Doug. 629, 4th ed. 651 a, 652, cited 1 Barn. and Ald. 467, 2 Barn. and C. 28, 30, and 2 Bing. 309, 312.

(n) 2 H. Bl. 340, cited 1 Barn. and Ald. 468, 469, 470.

(o) 8 Barn. and C. 36.

(p) Manderston v. Robertson, 4 Mann. and Ryl. 440; Pease v. Hirst, 10 Barn. and C. 122.

account, as the joint maker of the notes, and not in his character of executor. The action against the executors was commenced in January, 1822. It was *decided, that the payment of interest within [*443] six years by R. T. in his own right, and not in his character of executor, did not raise an implied promise by all the executors, as executors, to pay, and sufficient to take the case out of the Statute of Limitations.(q) Slater v. Lawson was an action of assumpsit brought by the executor of the payee of a joint and several promissory note, made by the defendant and one W. deceased. The only evidence in answer to the plea of the Statute of Limitations was, that of W.'s executrix, who proved that she had paid interest on the note after his death, and within four years of the commencement of the action. And this payment, it was decided, did not take the case out of the statute; the Court expressing an opinion, that "where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the other to take the debt out of the statute, as against the survivor. The contract here was severed by the death of W., and the act of his executrix could not bind the defendant."(r)

In Tullock v. Dunn, an action against two executors, the declaration contained the usual money counts, stating promises by the executors. The testator died more than six years before the action was brought, and both the executors had within six years acknowledged that the plaintiff's demand was due, and one of them expressly promised that it should be paid. The other had made no such promise, there being some doubt, whether the payment would be sanctioned by the testator's family. Abbott, Lord Ch. J., nonsuited the plaintiff, his Lordship saying, "I think, as against an executor, an acknowledgment merely is not sufficient to take the case out of the statute; there must be an express promise. The promise by one only is not enough to entitle the plaintiff to recover; there ought to be a promise by both."(s)

M'Culloch v. Dawes, was assumpsit against two executors, to recover a debt incurred by their testator, and averring promises by the defendants, as executors. To take the case out of the *statute, [*444] evidence was produced, by which it appeared, that shortly before the action was brought the plaintiff called upon the defendant D., stated his claim upon the testator's estate, and expressed a hope that the executors would see it settled. D. admitted that the debt was a just one, and that it had never been paid; and said he should be happy to serve the plaintiff in the matter if he could, but that he could not do any thing without the consent of the testator's family. It was decided, that this acknowledgment of the debt by one of the executors did not raise an implied promise on behalf of himself and his co-executor to pay it, and did not take the case out of the statute.(t)

The statute 9 George IV., c. 14, called Lord Tenterden's Act, recites and enacts as follows—

Whereas, by an Act passed in England in the twenty-first year of the reign of King James the First, it was, among other things, enacted, that all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their

(q) 2 Barn. and C. 23, cited 1 Barn. and Adol. 397, and 2 Bing. 310.

(r) 1 Barn. and Adol. 396.

(s) Ryan & Moody, 416.

(t) 9 Dowl. & Ryl. 40.

factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within six years next after the cause of such actions or suit, and not after: And whereas a similar enactment is contained in an Act passed in Ireland, in the tenth year of the reign of King Charles the First: And whereas various questions have arisen in actions, founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof: Be it therefore enacted,

That in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any [*445] case out of the operation of the *said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited Acts, or this Act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

II. That if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited Acts, or this Act, or either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.

III. That no endorsement or memorandum of any payment, written or made, after the time appointed for this Act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

[*446] *IV. That the said recited Acts, and this Act, shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

VIII. That no memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps.

IX. That nothing in this Act contained shall extend to Scotland.

X. That this Act shall commence and take effect on the first day of January, 1829.

Towler v. Chatterton decides, that an action commenced after the first of January, 1829, to recover a debt, which is at the time the action is brought of above six years' standing, cannot be maintained upon a verbal promise, which, before the day mentioned, the time when the Act began to run, the defendant made to pay the debt.(u) In Haydon v. Williams, which was an action of assumpsit to recover a debt incurred in 1820, the declaration was of Michaelmas Term, 1828, and the promise laid in it was absolute. At the trial after Hilary Term, 1830, the plaintiff called a witness, who stated, that about Midsummer, 1823, he had received a letter from the defendant, which he had since lost, and in which letter the defendant, referring to a demand for payment of his debt, said, that he was incapable then of paying the money, but would pay as soon as he had it in his power. It was held, that of this letter, signed by the defendant, secondary evidence was rightly admitted at the trial; that the same letter was such an acknowledgment or promise in writing, as falls within the meaning of the statute 9 Geo. IV., c. 14; but that the promise by the defendant, being guarded with the condition of his being able to pay, was a departure from the absolute promise laid in the declaration. And the consequence was, the plaintiff was nonsuited.(v) Willis v. Newham was assumpsit against the defendant as the maker of a promissory note. He pleaded *non assumpsit infra sex annos*. And at the trial the plaintiff called two witnesses, who proved verbal acknowledgments *by the defendant, that he had within six years paid [*447] money in respect of the note. It was decided, that, although [proof of actual payment of interest would be an answer to the Statute of Limitations, within the provisions of the statute 9 Geo. IV., c. 14, yet evidence of an acknowledgment of payment was within the mischief, which the latter statute was intended to prevent, and therefore that the verbal acknowledgment, which the defendant had made of payment, did not sustain the action; the Court expressing an opinion, that the first enactment in the statute, 9 Geo. IV., c. 14, must be engrafted upon the proviso, which saves the effect of payment of principal or interest, "and that the whole must be taken together, namely, that the payment must be proved, not by a verbal acknowledgment, but by evidence of an actual payment, or by a writing such as the Act requires, and that, being so proved, it shall have the same effect, as it had before the passing of the Act."(w) In Kennett v. Milbank, it was decided, that the particular case was not taken out of the Statute of Limitations, 21 James I., c. 16, by means of a deed to which the defendant was a party, and which recited that the defendant was indebted to the plaintiff, but did not specify the amount of the debt, and which deed had become void under a proviso contained in it.(x)

(u) 6 Bing. 258.

(v) 7 Bing. 163.

(w) 3 Y. & J. 518.

(x) 8 Bing. 38.

SECTION V.

OF THE POWER OF AN EXECUTOR TO REVIVE A DEBT BARRED BY THE STATUTE.

AN executor may, it is certain, take a case out of the Statute of Limitations, by his acknowledgment of, and promise to pay, the particular debt sought to be recovered out of the assets; and whether the debt was barred at the testator's death, or the six years have expired since that time.(y)

[*448] *In *Andrews v. Brown*, one V. D. gave a promissory note, and afterwards became a bankrupt, and went into France, and "long after six years and the death of V. D." Sir C. D., his brother and executor, recovering a debt of 5 or £6000, which was due to V. D., put out an advertisement in the Gazette, for all persons, who had any debts owing from his brother, to come to him, and make them out, and they should be paid. The plaintiff, having the note mentioned, sued in equity after the advertisement, to recover the money; and he obtained a decree for £300, which was the money due by the note, and interest allowed from the time of the bill brought.(z) And it is reported to have been in the same case held clearly, that "if a man has a debt due to him by note, or a book-debt, and has made no demand of it for six years, so that he is barred by the Statute of Limitations; yet if the debtor, or his executor, after the six years puts out an advertisement in the Gazette, or any other newspaper, that all persons, who have any debts owing to them, may apply to such a place, and that they shall be paid; this, though general, and therefore might be intended of legal subsisting debts only, yet amounts to such an acknowledgment of that debt, which was barred, as will revive the right, and bring it out of the statute again."(a) If, after the expiration of six years from the death of a testator, and when a debt owing by him is barred by the statute, the statute having been a bar in the testator's life-time, or become so since his death, his executor puts into a newspaper an advertisement, which, in an unqualified manner, invites all creditors to apply for payment, and also, in an unqualified manner, undertakes to pay them; *Andrews v. Brown* appears to be an authority, that such advertisement will revive a debt, barred either before or since the testator's death, and will bind his executor to pay it out of the assets. In *Jones v. Scott*, a testator died in July, 1816, and in January, 1822, the defendant, his administratrix with his will annexed, published in the Gloucester newspaper the following [*449] *advertisement:—"Notice is hereby given by me, C. A. S., of T., in the county of G., administratrix with the will annexed of R. D., of T., aforesaid, to all persons having, or claiming to have, any demand upon the estate of the said R. D., by specialty or otherwise, that they send in their several and respective statements of

(y) *McCulloch v. Dawes*, 9 Dowl. & Ry. 40; *Tullock v. Dunn*, Ryan & M. 416; *Atkins v. Tredgold*, 2 Barn. & C. 23. See also *Staggers v. Welby*, cited 2 Ves. & B. 282, and *Ault v. Goodrich*, 4 Russ. 430, 432.

(z) *Proc. Ch.* 385, 1 *Eq. Cas. Abr.* 305, cited 2 *Ves. & B.* 283, and 1 *Russ. & M.* 269, 270.

(a) 1 *Eq. Cas. Abr.* 305, pl. 15, *Proc. Ch.* 385.

their demands, and also attested copies of their several and respective securities, to Messrs. C., R., & M., or to Mr. B., on or before the 24th day of April next, for their examination, prior to the same being laid before J. H. A., of B., by whom I expect that the persons claiming to be creditors of the said R. D. do submit to be examined touching and concerning the same, if the said J. H. A. shall see occasion, in order to their respective claims being approved and paid, or rejected, if such latter course be deemed expedient." The plaintiffs were creditors of R. D. on the balance of a banking account, which had been ascertained in 1815; and to a bill filed by them in 1824, the defendant, by her answer, insisted on the statute. Sir John Leach decided, that the plaintiffs' debt was not revived by the advertisement published in the newspaper; "in as much as Mr. A. might have rejected any debt, upon the ground that the Statute of Limitations had run against it." (b)

SECTION VI.

OF THE POWER OF AN EXECUTOR TO WAVE THE PROTECTION OF THE STATUTE.

WHEN an executor is sued at law to recover a debt due from his testator, and to which debt the statute is a bar, either before the testator's death or after it, it is certain the executor may, if he thinks proper, plead the statute. (c) But if he desires to pay the debt, and to wave the protection which the statute would *afford against it, it may [*450] be doubtful in what cases he may at law, with safety to himself, omit to plead the statute. Lord Hardwicke, indeed, is reported to have, in a Court of Equity, said, "No executor is compellable, either in law or equity, to take advantage of the Statute of Limitations against a demand otherwise well founded." (d) But, although it is clearly in the power of an executor to take a case out of the statute, by his acknowledgment of, and promise to pay, the debt sued for, (e) yet, in *M'Culloch v. Dawes*, where the testator had incurred the debt in 1796, and he died in 1804, and the action against the executors was brought in 1826, and where consequently the testator had been dead more than twenty years, and the debt claimed was thirty years old, and where the plaintiff failed to prove that the executors had acknowledged and promised to pay the debt, Bayley, J., observed, that executors "are bound, if possible, to resist such a claim; they have no right to wave any legal defence to such an action; and if they did, and were to pay a debt, against the recovery of which there was any legal bar, they would render themselves liable over to those, who were interested in the testator's property." (f)

(b) 1 Russ. & M. 255, 261. And see ib. 269, 270, Lord Brougham's observations on the advertisement in this case, and on the authority of *Andrews v. Brown*.

(c) *M'Culloch v. Dawes*, 9 Dowl. & Ryl. 40; *Tullock v. Dunn*, Ryan & M. 416.

(d) *Norton v. Frecker*, 1 Atk. 526, 1 West Cas. T. Hardw. 207.

(e) *M'Culloch v. Dawes*, 9 Dowl. & Ryl. 40; *Tullock v. Dunn*, Ryan & M. 416; *Atkins v. Tredgold*, 2 Barn. & C. 23; *Foster v. Blakelock*, 5 Barn. & C. 328, 8 Dowl. & Ryl. 48.

(f) 9 Dowl. & Ryl. 43.

The Courts of Equity, it is observable, are not within the Statute of Limitations, 21 James I., c. 16.(g) This, Lord Redesdale has remarked, is true in one respect; they are not within the words of the statute, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statute, and have been always so considered. And the same learned judge expresses an opinion, that it is a mistake in point of language to say, that Courts of Equity act merely by analogy to the statute: they act in obedience to it. "I think," he says, "Courts of Equity are bound to yield obedience to the Statute of Limitations, upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. I think the statute [*451] *must be taken virtually to include Courts of Equity; for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and that it must be taken to have virtually enacted, in the same cases, a limitation for Courts of Equity also." (h) To a suit, therefore, in a Court of Equity, to recover a debt due from a testator, his executor is at liberty to put in a plea of the Statute of Limitations.(i) But in equity, as well as at law, satisfaction may be recovered out of the assets, if the case is taken out of the statute, by the testator's acknowledgment of, and promise to pay, the debt.(j) Although to a suit in equity an executor has the power to plead the statute, yet it appears he is not in all cases bound to do it, and on the contrary may, certainly in some cases, waive the benefit of such a plea. For in *Ex parte Dewdney*, it is said by Lord Eldon,—"In the administration of assets under a creditor's bill, executors are not bound to plead the Statute of Limitations; and if they do not, the creditor filing the bill will have a decree on behalf of himself and all other creditors, and will be paid. But the constant course in the Master's office is, to take the objection against other creditors, and to exclude from the distribution those, who, if legal objections are brought forward, cannot make their claims effectual." (k) In *Lord Castleton v. Lord Fanshaw*, a bill was brought by a residuary legatee, to have an account of the testator's estate, and the benefit of the surplus. And it appears that there having been a doubt, whether a sum of 4,000*l.* should be accounted assets or not, and while that point was undecided, several of the creditors of the testator compounded with the executors, to take less than their full debts. The 4,000*l.* was afterwards adjudged to be assets; and the executors were desirous that the creditors might have their full debts; but that was opposed by the plaintiff, who insisted [*452] that most of the creditors' debts were barred by the statute. *The defendants, the executors, would not, however, plead the statute. And it is reported that two points to be determined (and it is presumed both points are confined to the creditors who had compounded) were—1. Whether the creditors who had made compositions for less than their full debts, upon a supposition of a defect of assets, should now be held to that composition, when the executors did not desire it:—2. Whether the creditors should be sent to law to recover their

(g) 10 Ves. 467, 15 Ves. 496, 19 Ves. 470, 1 Sim. 398.

(h) 2 Sch. & Lef. 630, 631.

(i) *Webster v. Webster*, 10 Ves. 93.

(j) *Galway v. Earl of Barrymore*, 1 Dick. 163.

(k) 15 Ves. 498.

debts, and the plaintiff be ordered to make defence in the executors' place, and so be enabled to bar them, by pleading the statute, which the executors would not do. And, according to the same report, Lord Somers said, "I cannot set aside the composition the creditors have made; they have no bill for that purpose, and only come in before the Master: therefore they must abide by the composition. But I cannot consent that the Statute of Limitations should be pleaded; therefore their debts must be paid." (l) The following case shews, that when in a suit in equity an executor refuses to set up the statute, other parties may, under some circumstances, do it. *Shewen v. Vanderhorst* was a suit instituted by a residuary legatee, for the purpose of having the real and personal estates of a testator administered, and the trusts of the will carried into execution. Under the usual decree, directing, among other things, an account to be taken of the debts, a creditor of the name of P. went in to prove a debt, against which it was admitted, that the statutory period had run before the testator's death. The executor did not object to the proof in the Master's office; but the objection that it was barred by the Statute of Limitations was taken and insisted on by the plaintiff, and the Master accordingly disallowed the claim. The Master's opinion having been afterwards confirmed by the judgment of the Master of the Rolls, the creditor appealed to Lord Brougham. His Lordship, in pronouncing judgment, first observed on *Castleton v. Fanshaw*, in 1 Equity Cases Abridged, that that case goes only to the extent, "that where an executor is sued at law, a Court of Equity will not compel him to plead the statute, a proposition which, in fact, amounts to no more than *this, that the Court will not call upon him, in [*453] administering the estate here, to set up the statute as a bar to any demands that may be made against the assets." And his Lordship continued,—"But the question here is, whether, when a decree has been pronounced, taking possession of the estate, and vesting it in the Court for the purpose of distribution, a decree by which the accounts are directed to be taken, and the assets are to be administered in the Master's office, and after which the common law must be altogether silent; whether, under these circumstances, if the objection that the statute has barred the remedy be raised against a debt, and in whatsoever way, or by whomsoever, being parties in the suit, be they creditors, or executors, or even volunteers, the objection be raised, it must not be considered fatal. And without at present saying how far the Master is himself entitled to set up the objection, I can see no reason, certainly, why it may not be competently taken by a creditor, or a volunteer, as well as by the personal representative. The order of the Master of the Rolls must, therefore, be affirmed." (m)

(l) *Proc. Ch.* 99, 1 *Eq. Cas. Abr.* 305, (m) 1 *Russ. & M.* 347.
 cited 1 *Russ. & M.* 352.

SECTION VII.

OF THE EFFECT OF THE STATUTE, IN CERTAIN CASES OF TRUST.

If a debtor creates a trust to pay his debts, this trust will, under some circumstances, take a case out of the Statute of Limitations, 21 James I., c. 16. (n)

When a will contains a devise of real estate, in trust for the payment of debts, and a simple contract debt is contracted, or by a promise to pay is revived, within six years before the death of the testator, and consequently at his death is not affected by the statute, then, in a Court of Equity, this real fund will be liable to *pay the debt, although after the expiration of the six years from the cause of action, or time when the debt was contracted or revived, the remedy at law may be gone. (o) And the same effect will be produced by a trust, which a will creates by means of a charge on real estate. (p)

When, however, a simple contract debt is, at the death of the testator, barred by the statute, and he, for the purpose of paying his debts, provides by his will a real fund, auxiliary to his personal estate, such real fund being real estate, which he either devises in trust for, or charges with, the payment of his debts, in this case, the debt, which is at the testator's death barred by the statute, will not be payable out of the real estate. (q)

In *Jones v. Scott*, a person, reciting in his will that he was seised in fee of an estate at T., thereby devised that estate to trustees and their heirs, and, for the purpose of paying his debts, made it a fund auxiliary to his personal estate; he directing by the will, that, in case his debts could not be paid off from his personal estate, then his real estate at T. should be either mortgaged or sold for the purpose of discharging his debts. The testator died in 1816, and his general personal assets having been found to be not nearly sufficient for the payment of his debts, steps were taken to sell the T. estate; and it was then discovered that the testator's interest in the property, instead of being freehold, as he had imagined, was only leasehold for a long term of years. The plaintiffs were creditors of the testator on the balance of a banking account, which had been ascertained in 1815. Sir J. Leach decided, that their debt, being to be claimed against the executors, and not under the trust, was barred by the statute. "The law," he said, "does not permit a testator to create a special trust of his personal estate, so as to withdraw it from the administration of his executors. Whatever *he may attempt to do [*455] in that respect, all claims must nevertheless be made against the executors, and trustees named in a will can receive only the residue,

(n) 1 Dick. 163; 15 Ves. 497; 6 Madd. 326; 2 Glyn & J. 47; Anon. 1 Salk. 154, cited 2 Ves. & B. 281; *Halsted v. Little*, (Hil. 1632, Toth. tit. Debt, ed. 1820, p. 53, and which case states,—“Debts, though beyond the Statute of Limitations, ordered to be paid, because directed to be paid by will.”

(o) *Hughes v. Wynne*, 1 Turn. & R. 307; *Ault v. Goodrich*, 4 Russ. 430; *Rendell v. Carpenter*, 2 Y. and Jerv. 484.—1

Sch. and Lef. 110, 2 Ves. and B. 280, 281, 1 Russ. and M. 269.

(p) *Morse v. Langham*, stated 2 Ves. and B. 286; *Hargreaves v. Michell*, 6 Madd. 326; *Executors of Fergus v. Gore*, 1 Sch. and Lef. 107.

(q) *Burke v. Jones*, 2 Ves. and B. 275, cited 6 Madd. 326, and 1 Russ. and M. 274. —1 Sch. and Lef. 109, 110.

after all demands on the personal estate are satisfied. The debt of the plaintiff being, therefore, to be claimed against the executors, and not under the trust, is barred by the Statute of Limitations.”(r) His Honor dismissed the bill with costs. But this decree has been reversed by Lord Brougham; and it appears his Lordship’s reversal does not turn on the circumstance, that, in the particular case, the testator had mistaken the nature or tenure of the property which he made a fund, auxiliary to his personalty, for the payment of his debts; but is a decision to the general effect, that if a person by his will expressly affixes to his personal estate a trust for the payment of his debts, in a Court of Equity this trust prevents the operation of the statute against the testator’s simple contract debts, which were not barred by it at the time of his death.(s)

SECTION VIII.

OF CASES, WHERE THE STATUTE HAS BECOME A BAR PENDING A SUIT IN EQUITY.

WHEN a creditor files a bill in equity to recover his debt, and, pending the suit, the Statute of Limitations runs against it, and afterwards the bill is dismissed; in such a case, the Court will, perhaps, under some circumstances, preserve the plaintiff’s right, and will not suffer the statute to be pleaded at law in bar to his demand.(t) But it seems to be certain that, generally speaking, when a creditor files a bill in equity, and pending the suit his debt is barred by the statute, and then the bill is dismissed, the Court will not interpose to prevent the setting up of the statute, as a defence to an action afterwards brought at law to recover the debt.(u) And, although the time limited by the statute [*456] has expired since the commencement of the suit in equity, yet where there is a ground to dismiss the bill, the Court will do it, notwithstanding the effect of the dismissal may be, that, in an action at law, the plaintiff will be met by a plea of the statute.(v)

Sirdefield v. Price was a suit instituted by a person, claiming to be a creditor in respect of two several promissory notes, and a memorandum, or I. O. U., against executors, for payment of his debt, and the usual accounts of the debtor’s estate. The answer questioned the validity of the debt, and stated circumstances inducing a presumption of satisfaction. At the hearing, the Court, feeling some doubt on the subject, retained the bill for a year, with liberty for the plaintiff to bring an action at law. The plaintiff accordingly brought an action in the Court of Common Pleas, to which the defendant pleaded the general issue, and also the Statute of Limitations. The first note was dated the 12th March, 1817, for 200*l.*; the second, the 21st June, 1817, for the like sum: and the I.

(r) 1 Russ. and M. 261.

(s) *Ibid.* 255.

(t) Anon. 1 Vern. 73; *Gilbert v. Emerson*, 2 Vern. 503; *Sturt v. Mellish*, 2 Atk. 610, 615. See also Anon. 2 Ch. Cas. 217, and *Mackenzie v. Marquis of Powis*, 7 Bro. P. C. ed. Toml. 282.

(u) *Craddock v. Marsh*, 1 Ch. Rep. 205; *Hurdret v. Calladon*, *ib.* 214; Anon. 2 Ch. Cas. 217. See also *Peeres v. Bellamy*, cited 2 Vern. 504; *Lake v. Hayes*, or *Hales*, 1 Atk. 282, 1 West Cas. T. Hardw. 7; Anon., S. C., 2 Atk. 1.

(v) *Hurdret v. Calladon*, 1 Ch. Rep. 214.

O. U. was dated a few days subsequently, and was for 100*l*. The bill was filed on the 26th March, 1823. By Alexander, L. C. B.,—"I understand the case to be this: the bill seeks to enforce the payment of three several notes, and the equity raised to support this bill is a general account and administration of assets. Now, this being the equity here, the suit is brought to a hearing, and a decree made for an account. It happens, that in the interval between the filing of the bill and the decree, the Statute of Limitations takes effect. The bill was filed on the 26th March, 1823, the first note being dated the 12th March, 1817, and as to which, therefore, the remedy was clearly barred by the statute before the bill was filed. As to the other instruments, however, the statute did not accrue till after the filing of the bill. It would be in the highest degree [*457] unjust, and would be contrary to all the practice of this Court, and to the merits of the case, if the defendant were to be allowed to avail himself of the statute, as to the two last notes. As I would have made a decree for the payment of them at the hearing, had this been a clear legal demand, and an objection had not been made to it in the course of the proceedings, I will not permit the party now to set up the statute, which has accrued since the filing of the bill. If there be any stated account, as alleged by the answer, that will be a good defence at law." The Court ordered, that the defendant be restrained from insisting at law upon the Statute of Limitations, with regard to the note, dated the 21st June, 1817, and to the subsequent demand for 100*l*.^(w)

In *Sterndale v. Hankinson*, a bill in equity was filed on the 5th May, 1812, by several persons on behalf of themselves and all other the creditors of G. H., deceased. G. H. died intestate, and was, at his death, a trader within the meaning of the bankrupt laws. The bill prayed for the usual accounts of the debts due to the plaintiffs, and the other creditors who should come in, &c., and of the intestate's real and personal estates; and that those estates might be applied in payment of the debts of the plaintiffs, and the other creditors of the intestate, who should come in, &c. On the 14th April, 1818, the decree, which is usual in suits of the like nature, was made. The Master reported that several persons had come in before him, and claimed debts to be due to them from the intestate, none of which he had thought fit to allow, except one, which had been proved by the plaintiffs B. and H.; and that his reason for disallowing the debts claimed by the other persons was, that the testator died in 1810, and that the decree was not made until eight years afterwards, and that no proceedings had been taken for the recovery of those debts, whereby the claimants were, as he conceived, barred of any remedy. Three of the persons, whose claims had been disallowed, except- [*458] ed to this report. And this exception was by Sir *A. Hart allowed. "That the commencing proceedings in equity will not prevent the operation of the Statute of Limitations is," he said, "indisputable. If a creditor's bill is dismissed, the pendency of the suit will not prevent the defendant from taking the benefit of the statute. As Courts of Equity will not entertain stale demands, they have thought proper to adopt the limit of six years, in analogy to the statute; and pleas

(w) 2 Y. and Jerv. 73. A note by the reporter states, that "it appeared subsequently, that the bill was not a bill for the general administration or assets, but confined to the plaintiff's particular demand."

of the statute are admitted in these Courts by analogy only. Where the circumstances of a case are such, as to make it against conscience to apply the rule founded upon this analogy, the Court will not enforce it. It has been said, that if a creditor files a bill on behalf of himself and others, and permits it to be dismissed before decree, the statute would apply. I dissent from this proposition; for I think that the Court would protect a creditor against any accident of that kind. I have no doubt, that if a creditor file a bill, and it appears that the rule adopted by analogy to the statute would affect his demand, but that a bill had been before filed by another creditor, and that the plaintiff in the second suit had, in confidence that the former suit would be prosecuted, abstained from filing his bill, the Court would not apply its rule. Every creditor has, to a certain extent, an inchoate interest in a suit instituted by one on behalf of himself and the rest; and it would be attended with mischievous consequences to estates of deceased debtors, if the Court were to lay down a rule, by which every creditor would be bound either to file his bill, or bring his action. Suits have been instituted in which creditors, in consequence of the deaths of parties, and a variety of other circumstances, have been unable to procure a decree for two or three years, although every reasonable diligence may have been used; and if the schedules to most of the reports made in suits of this nature were looked through, it would be found, by comparison of dates, that two-thirds of the creditors might have been shut out, by a strict application of the rule. It has been said, that every creditor, who files a bill on behalf of himself and the other creditors, may dismiss his bill if he pleases. But this proposition is not true, to the extent to which it has been stated. I apprehend that it is not the rule of the Court, that a creditor may, under all circumstances, dismiss his bill. I recollect instances in [*459] which a creditor, who has filed a bill on behalf of himself and the other creditors, has worked a benefit to himself by the orders of the Court, and has attempted to dismiss his bill; but I have a strong impression that Lord Eldon said, that, having given the Court possession of the suit by a decretal order, it was not competent to him to defeat any other creditor by dismissing his bill. I entertain no doubt that every creditor has, after the filing of the bill, an inchoate interest in the suit, to the extent of its being considered as a demand, and to prevent his being shut out, because the plaintiff has not obtained a decree within the six years; and, therefore, I am clearly of opinion that this exception must be allowed.”(x)

*CHAPTER XXXV.

[*460]

OF THE SATISFACTION OF A DEBT BY A LEGACY.

If a person bequeaths a legacy of money, and is, at the time of the bequest, indebted to the legatee in a sum, which is greater than the legacy, then, the legacy being less than the debt, the bequest is interpreted

(x) 1 Sim. 393.

not to be a part satisfaction of it, and the legatee is entitled to be paid both the debt and the legacy.(a) And if, after a bequest of money, the testator contracts a debt with, or becomes indebted to, the legatee, in this case the bequest is not a satisfaction of the debt, and the legatee will be entitled to both debt and legacy, although the sum bequeathed is greater than the debt.(b)

If, however, a person bequeaths a legacy of money, and is, at the time of the bequest, indebted to the legatee in a sum, which is less than the legacy, then, the legacy being greater than the debt, the bequest is, generally speaking, and under the mere circumstances mentioned, interpreted to be a satisfaction of it, and the legatee is not entitled to be paid both the debt and the legacy.(c) And the same interpretation and effect take place, if the legacy is not greater than, but is equal only to, the debt.(d)

[*461] *And, in either case, the same construction and effect follow, although the legacy is bequeathed by a father to his child,(e) or by a husband to his wife.(f) And as a debt of a gross sum may be satisfied by a legacy of greater amount, so may an annuity, given by bond, be satisfied by a greater annuity bequeathed by the obligor's will.(g)

The cases which establish this doctrine of satisfaction constitute a rule, which, when it was introduced, seems to have been grounded on a maxim, that a man ought to be just, before he is bountiful.(h) But it is a rule, which many judges have expressed their disapprobation of;(i) Lord King saying, "he did not see any great reason, why, if one owed 100*l.* to A. by bond, and should afterwards give him a legacy of 500*l.*, this legacy must go in satisfaction of the debt; for if so, the whole 500*l.* would not be *given*, in regard 100*l.* of it would be *paid* towards a just debt, which the testator could not help paying, and therefore the whole 500*l.* would not be given, against the express declaration of the testator, who says he *gives* the same:"(j) It is nevertheless a rule, which is universally acknowledged to be law, and cannot now, as a general rule, be overturned.(k) But while it is admitted so far to be binding, the Courts lean very much to create exceptions out of it, and eagerly lay hold of any minute circumstance, which, in a new case, may authorise them to do so.(l) And, ac-

(a) *Minuel v. Sarazine*, Mos. 295; *Stanway v. Styles*, 2 Eq. Cas. Abr. 355; *Slanning v. Style*, S. C., 3 P. W. 334.—2 Salk. 508, 2 P. W. 616.

(b) *Cranmers case*, 2 Salk. 508; *Cuthbert v. Peacock*, 2 Vern. 593, 1 Salk. 155; *Thomas v. Bennet*, 2 P. W. 341, fourth point; *Fowler v. Fowler*, 3 P. W. 353; *Robins v. Cope*, cited 1 Ves. 324.—1 P. W. 299. See also *Gaynon v. Wood*, 1 Dick. 331.

(c) *Talbott v. Duke of Shrewsbury*, Prec. Ch. 394; *Reech v. Kennegal*, 1 Ves. 123; *Gaynon v. Wood*, 1 Dick. 331, 1 P. W. 5th ed. 409, n.; *Davison v. Goddard*, Gilb. Eq. Rep. 65.—1 Ves. 263, 2 Atk. 301, 493, 3 Atk. 68, 3 Ves. 564.

(d) *Brown v. Dawson*, Prec. Ch. 240, 2 Vern. 498; *Talbott v. Duke of Shrewsbury*, Prec. Ch. 394; *Gibson v. Scudamore*, Mos. 7; *Willoughby v. Earl of Rutland*, Nels. 38.—3 P. W. 354; 1 Ves. 263; 2 Ves.

636; 2 Atk. 301, 493; 3 Atk. 68; 3 Ves. 564.

(e) *Willoughby v. Earl of Rutland*, Nels. 38; *Plume v. Plume*, 7 Ves. 258. See also *Tolson v. Collins*, 4 Ves. 483.

(f) *Fowler v. Fowler*, 3 P. W. 353.

(g) *Graham v. Graham*, 1 Ves. 262.

(h) 1 Salk. 155; 1 P. W. 410; 3 P. W. 354.

(i) 1 Salk. 155; 2 Vern. 594; 2 P. W. 616; 3 P. W. 354; 1 Ves. 520; 2 Ves. 536; 3 Atk. 68; 3 Ves. 466, 529, 564.

(j) 1 P. W. 410.

(k) 1 P. W. 410; 3 P. W. 354; 2 Ves. 636; 2 Atk. 301; 3 Atk. 68; 3 Ves. 529. In *Cranmer's case*, 2 Salk. 508, the rule, if it was then established, appears to have been wholly disregarded by Lord Harcourt, when, as to the debt contracted before the will, he reversed the decree of the Master of the Rolls.

(l) 2 Ves. 636; 2 Atk. 301; 3 Atk. 68, 97, 98; 3 Ves. 466, 529.

cordingly, several instances occur, wherein the legatee has been decreed to be paid both the legacy and the debt;(*m*) as—in Cuthbert v. Peacock, where the testator, indebted *to his niece F. 100*l.* by bond, [*462] by will gave her 300*l.*, to be paid in eighteen months after his decease, and, if not then paid, to be paid with interest till paid; and by the will he gave 200*l.* a-piece to her sisters; and afterwards, by a codicil, reduced the legacies of 200*l.* to 100*l.* a-piece to his other nieces, but said nothing as to his niece F., and afterwards borrowed of his niece F. 100*l.* more; and where Lord Cowper decreed the 300*l.* legacy to be paid, over and above the debt; on the grounds, that there were assets, and that, according to the parol evidence admitted, F. was the testator's favourite niece, and that he did not intend that she should be reduced to a less legacy, than what was given to her sisters:(*n*) in Chancey's case, where one being indebted for wages to a maid-servant, who had lived with him for a considerable time, gave her a bond for 100*l.*, and, in the condition of the bond, it appeared to be for wages; and afterwards he by his will, among other things, gave a legacy of 500*l.* to this maid-servant, and it was mentioned in the will to be given to her, for her long and faithful services; and in which case, under a decree by Lord King, the legatee had both her debt and legacy; his Lordship relying principally on the circumstance "that the testator, by the express words of his will, had devised 'that all his debts and legacies should be paid;' and this 100*l.* bond being then a debt, and the 500*l.* being a legacy, it was as strong, as if he had directed that both the bond and legacy should be paid:"(*o*) in Nicholls v. Judson, where W. L., to reward the good services of A. M., who had lived with him a great number of years, gave her a bond in 1728, for payment of 300*l.* and interest on a day fixed, and in 1731 paid her 100*l.* part of the 300*l.*, and all interest; and, in which case, W. L. in 1736 made his will, and thereby gave to Mr. M. all his lands, &c., in B., to hold for 200 years, upon trust to raise and pay to A. M., within two *years after his death, 200*l.*; and also devised [*463] other lands to the same trustee for 300 years, upon trust to pay 200*l.* to A. M., within one year after his death; and likewise gave to A. M., plate, linen, and other legacies; and where Fortescue, M. R., decided, that the two legacies of 200*l.* were not a satisfaction of the bond; his Honor being of opinion, that the case was taken out of the general rule by the circumstances, that the legacies were not made payable at the testator's death, but at a future time, and, being charged on land, would have sunk into it, if the legatee had died before the time of payment.(*p*)

In Carr v. Eastabrooke, Sir R. P. Arden, admitting the general rule, that "*simpliciter*, a legacy to a creditor of equal or greater amount than

(*m*) Atkinson v. Webb, Prec. Ch. 236, 2 Vern. 478; Goodfellow v. Burchett, 2 Vern. 298; Mathews v. Mathews, 2 Ves. 635; Richardson v. Greene, 3 Atk. 65, cited 11 Ves. 547, 548; Clark v. Sewell, 3 Atk. 96; Hobbs v. Taite, 1 West Cas. T. Hardw. 582, cited 11 Ves. 548, 549; Field v. Mostin, 2 Dick. 543; Tolson v. Collins, 4 Ves. 483, a case of a legacy by a father to his daughter;

Wallace v. Pomfret, 11 Ves. 542. See also Rawlins v. Powel, 1 P. W. 297; Anon. v. Powell, S. C., 10 Mod. 398; Barret v. Beckford, 1 Ves. 519.

(*n*) 2 Vern. 593, and 3rd ed. n. (4), 1 Salk. 155.

(*o*) 1 P. W. 408, Chancy v. Wootton, S. C., Sel. Ca. Ch. 44.

(*p*) 2 Atk. 300.

the debt is an extinguishment," refused to carry the rule farther, and to hold a legacy to be an extinguishment of a negotiable security.^(q)

A case is thus reported—"A. made his two brothers executors, and gave a legacy of 100*l.* to B., the daughter of one of them. The executors settled an account, and divided the assets, and then the uncle executor by his will gave B. 200*l.*, and died. And on a bill for these legacies, it was held by Sir J. Jekyll, that as the 100*l.* legacy was the debt of both the executors, the gift of 200*l.* by the dead executor could not be intended to discharge it, there being no reason to suppose that he designed to make satisfaction for the debt of his co-executor."^(r)

Many authorities shew, that, to take a case out of the general rule, which makes a legacy greater than, or equal to, a debt to be a satisfaction of it, a ground that may be relied on is,—that the thing given by the will is of a nature different from that of the debt,^(s) as where the subject of the gift is land;^(t) that the legacy is given upon condition;^(u) that it is given upon a contingency;^(v) that it is made due not at the testator's death, but *at a future day;^(w) that it is charged upon land, [*464] and made payable at a future day, and therefore may be lost to the legatee, if he dies before the time of payment;^(x) that the will directs, that all the testator's debts and legacies shall be paid;^(y) that the testator's disposal of his estate is preceded by the words, "after my debts are discharged, I give," &c., or, "after debts and legacies are paid, I give," &c;^(z) that the debt was upon an open and running account between the testator and legatee, so that it might not be known to the testator, whether he did owe any money to the legatee, or not;^(a) and that, in the case of an annuity given, and secured by a bond, in the testator's lifetime, and an equal annuity given by his will, the one given by the will is not so advantageous to the annuitant as the other; the one secured by the bond being payable quarterly, and that given by the will half yearly, the former, also, free from all deductions; the latter being payable out of land, and therefore liable to taxes.^(b)

With respect to the admission of parol evidence to take a case out of the general rule, and to rebut the presumption that a legacy greater than, or equal to, a debt is meant to be given in satisfaction of it, in other words, "to shew that the testator designed to give such legacy, exclusive of the debt," an opinion that it ought not to be admitted appears to have been expressed by Lord Talbot,^(c) and Lord Hardwicke,^(d) the former

(q) 3 Ves. 561.

(r) *Garrat v. Garrat*, 2 Eq. Cas. Abr. 356.

(s) 2 Salk. 508; 1 Atk. 428; *Stanway v. Styles*, 2 Eq. Cas. Abr. 355; *Slanning v. Style*, S. C., 3 P. W. 334.

(t) 2 Salk. 508; 2 P. W. 616; 1 Atk. 428; *Goodfellow v. Burchett*, 2 Vern. 298.

(u) 2 Salk. 508.

(v) *Talbot v. Duke of Shrewsbury*, Prec. Ch. 394; *Tolson v. Collins*, 4 Ves. 483.—2 Atk. 493; 3 Atk. 98. See also *Crompton v. Sale*, 2 P. W. 553, 1 Eq. Cas. Abr. 205.

(w) *Nicholls v. Judson*, 3 Atk. 301; *Clark v. Sewell*, 3 Atk. 98.

(x) *Nicholls v. Judson*, 3 Atk. 300;

Richardson v. Greese, 3 Atk. 65.

(y) *Chancey's case*, 1 P. W. 410, cited 1 Dick. 332, and 4 Madd. 331; *Field v. Mostin*, 2 Dick. 543; *Tolson v. Collins*, 4 Ves. 483.

(z) *Richardson v. Greese*, 3 Atk. 65, cited 11 Ves. 548.

(a) *Rawlins v. Powel*, 1 P. W. 297, 299; *Anon. v. Powell*, S. C., 10 Mod. 398.

(b) *Atkinson v. Webb*, Prec. Ch. 236, 2 Vern. 478.

(c) 3 P. W. 354.

(d) 3 Atk. 68.

learned judge acknowledging, indeed, that in some cases such evidence had been allowed. It has before been seen, that Lord Cowper permitted it to be used in *Cuthbert v. Peacock*; (e) and this authority [*465] *appears to agree with the following case of *Wallace v. Pomfret*, determined by Lord Eldon, and which decides, that even where the presumption of satisfaction, under the general rule, is aided by some expression in the will, parol evidence may be admitted to rebut that presumption. In *Wallace v. Pomfret*, R. J. M. by his will, after giving to G. W. 500*l.*, over and above what the testator might owe him on balance of any account, or otherwise, at the testator's death, proceeded to give the following legacies,—“And to my servant J. S., if in my service at the time of my decease, 10*l.*, over and above all such monies as I shall owe him for wages, or otherwise. And I give to my housekeeper, M. P., 1000*l.*” The bill was filed by the executors against M. P., praying that the legacy of 1000*l.* might be declared to be a satisfaction of the sum of 125*l.* 12*s.* 6*d.* claimed by the defendant, as wages due to her from the testator. In this case, Lord Eldon admitted parol evidence to repel the presumption, upon the rule of law, that the legacy greater than the debt was meant to be in satisfaction of it, although, upon the whole will, an inference arose, that satisfaction was intended, but which inference was not strong enough to require a decision to that effect. The testator, his Lordship said, “imposes a condition as to another servant, of being in his service at his death; a condition not imposed as to the legacy to this defendant. To that other servant he gives 10*l.*, in addition to all such monies as he shall owe him for wages, or otherwise: that legacy connecting itself, not only with the debt due at that time, but with any debt the testator might owe at his decease to that servant. Then immediately afterwards comes this legacy of 1000*l.* to the defendant. As to two persons, standing in the same relation to him, and having demands of the same nature, he says the legacy to one is to be in addition to wages, and does not say that as to the other. The presumption, therefore, not upon the rule of law, but upon the whole will, is, that this legacy is not in addition to wages; the testator having expressly directed, that the other shall be in addition. The question whether the evidence is admissible, or not, turns upon the point whether the inference from [*466] the *express direction, that the other legacy shall be in addition to wages, is strong enough to require a decision, that, as to this legacy, the addition to wages is, upon the face of the will, necessarily excluded. If it is not, then, upon the rule as to satisfaction of portions, &c., these declarations may be admitted. If admitted, they are to be looked at with great attention; to see, whether the necessary effect is to beat down the fair inference from the written context; which is the most solemn declaration he can make; particularly, as the parol declaration is not cotemporary.” The effect of the evidence, which Lord Eldon admitted in this case, was, that his Lordship decided, the legacy was not a satisfaction of the debt. (f)

A description of debt, to which also the doctrine of satisfaction is applied, is one that arises from a contract made by a husband, as by bond or covenant, to make a provision for his wife, in the event of her surviving him. In these cases, a question sometimes arises, whether a bequest, or other cause, from which the wife becomes entitled to a sum of

(e) 3 Vern. 593, 1 Salk. 155.

(f) 11 Ves. 542.

money, or other property, out of her husband's estate, is to be construed to be a satisfaction or performance of the contract entered into by him;(g) and on which question depends the title of the wife to take under the contract only, or a double provision, both the one under the contract, and also the farther provision claimed by her out of her husband's estate.

A satisfaction or performance of the contract has been held to take place, amongst other instances,(h)—in *Blandy v. Widmore*, where, upon the marriage of A. with B., there were articles reciting that, in consideration of the marriage and of the portion, it was agreed that if B. the wife should survive A., her intended husband, A. should leave B. 620*l.* [*467] and accordingly A. covenanted *with trustees that his executors, within three months after his decease, should pay B. 620*l.* if she should survive him; and in which case A. died intestate, and without issue; and thereupon B. became, by the Statute of Distribution, entitled to a moiety of her husband's personal estate, and where Lord Cowper decided, that such moiety, which was much more than 620*l.*, “shall be accounted as in satisfaction of, and to include in it, her demand by virtue of the covenant, so that she shall not come in first as a creditor for the 620*l.*, and then for a moiety of the surplus:”(i) In *Lee v. D'Aranda and Cox*, where, in a deed previous to the marriage of M. with her first husband L., in consideration of the marriage, and of the marriage portion of M., L. covenanted that he would in his life-time, either by his will or by some sufficient assurance in the law, grant to M. 1000*l.*, to be paid to the said M. after the decease of L. in case she should survive him; and in case L. should not by will, or otherwise, in his life-time assure to M. the said 1000*l.*, that then the executors or administrators of L. should, within the space of six months next after the decease of L., pay to M. the sum of 1000*l.*; and in which case L. died, without making any will, or, pursuant to the covenant, any deed; and where Lord Hardwicke decreed, that M. “is not entitled to the said 1000*l.* by virtue of the said marriage articles, as a debt out of the intestate's estate, and also to a distributory share of her husband's personal estate, in case it shall amount to, or be more than, the sum of 1000*l.*”(j) in *Wathen v. Smith*, where J. W. in his marriage settlement covenanted, that in case E. S., his intended wife, should survive him, his heirs, &c., should, within six calendar months next after his decease, pay or cause to be paid to the said E. S., her executors, &c., the sum of 1000*l.* sterling, to and for her and their own use and benefit; and where J. W. by his will, in addition to several other bequests to his wife, bequeathed as follows:—“I also give and bequeath unto my said dear wife E. W. the sum of 1000*l.* of lawful money of Great Britain, to be paid to her within three calendar months next after my *decease, for her own use and [*468] benefit;” and in which case Sir J. Leach decided, that the legacy was a satisfaction or performance of the covenant.(k)

(g) On this subject, see, besides the authorities after referred to, *Davila v. Davila*, 2 Vern. 724, cited 10 Ves. 18; *Oliver v. Brighthouse*, or *Brickland*, cited 1 Ves. 1, 3 Atk. 420; *Kirkman v. Kirkman*, 2 Bro. C. C. 95; also *Barret v. Beckford*, 1 Ves. 519; and *Jeacock v. Falconer*, 1 Bro. C. C. 295, 1 Cox, 37.

(h) *Corus v. Farmer*, 2 Eq. Cas. Abr. 34; *Garthshore v. Chalie*, 10 Ves. 1; *Goldsmid v. Goldsmid*, 1 Swanst. 211, 1 Wils. 140.

(i) 1 P. W. 324, 2 Vern. 709.

(j) 3 Atk. 419, and ed. Sand. 423, n.

(1) 1 Ves. 1.

(k) 4 Madd. 325.

A satisfaction or performance of the husband's contract has been held not to take place, amongst other instances, *(l)*—in *Haynes v. Mico*, where, upon the marriage of J. and S. M., the husband gave a bond to trustees, to leave to the wife 300*l.* payable in a month after his decease, in case she should survive him; and where the husband by his will gave to his wife 500*l.*, payable within six months after his decease; and in which case Lord Thurlow decreed, that the legacy of 500*l.* was not a satisfaction of the 300*l.* secured by the bond: *(m)* in *Forsyth v. Grant*, where W. G., by a bond made previous to his marriage with G. L., became bound in the sum of 4000*l.*, with a condition reciting that the said W. G. had agreed to leave to the said G. L., or the child or children of the marriage, the sum of 2000*l.*, and which condition of the bond was, that if the heirs, &c., of W. L. should, within three months after his decease, pay to the trustees the sum of 2000*l.*, in trust that the trustees should place out the same at interest, and, in case there should be any children, should then pay the interest in manner therein mentioned, or, if there should be no child or children living at the death of the said W. G., in trust, as to the said principal sum of 2000*l.* for the sole use and benefit of the said G. L., then the bond to be void, and, in which case of *Forsyth v. Grant* there was no issue of the marriage, and W. G. by his will gave to trustees all the estate, real and personal, he was then, or might happen to die, possessed of, in trust to pay to his beloved wife, G. G., the annual rent or yearly profits of all his said estate, real and personal, yearly and every year, by equal portions, and, after her decease, to divide the estate among the plaintiffs; and where Lord Thurlow decided, that the wife should take both the sum secured by the bond, and her life estate under the will. *(n)*

*CHAPTER XXXVI.

[*469]

OF AN EXTINGUISHMENT, OR RELEASE, OF A DEBT BY A TESTAMENTARY ACT. *(a)*

A TESTAMENTARY act, as a declaration or clause contained in a will, cannot at law operate as a release of a debt owing to the testator; *(b)* but, in a Court of Equity, it may have the effect of extinguishing the debt. *(c)* And, even in equity, a testamentary act is not permitted to operate as an extinguishment, as against the creditors of the testator. *(d)*

(l) *Perry v. Perry*, 2 Vern. 505; *Eastwood v. Vinks*, 2 P. W. 614; *Devese v. Pontet*, 1 Cox, 188; *Richardson v. Elphinstone*, 2 Ves. jun. 463; *Couch v. Stratton*, 4 Ves. 391; *Adams v. Lavender*, *M'Clel. & Y.* 41.

(m) 1 Bro. C. C. 129.

(n) 3 Bro. C. C. 242; *Forsight v. Grant*, S. C., 1 Ves. jun. 298.

(a) On a release, or an extinguishment

of a debt owing to a testator, see, besides the authorities after referred to, *Eden v. Smyth*, 5 Ves. 341; *Aston v. Pye*, ib. 350, n., and also stated ib. 354; *Reeves v. Brymer*, 6 Ves. 516.

(b) 1 Vent. 39; 1 Salk. 304; 1 P. W. 85; 2 P. W. 332; 3 Atk. 581; 1 Ves. 50.

(c) 3 Atk. 581; 1 Ves. 50; 1 P. W. 85.

(d) 2 P. W. 332; 3 Atk. 581; 1 Ves. 50.

A mere bequest of a legacy will not extinguish a debt owing by the legatee to the testator; and if the legacy is greater than the debt, the executor may deduct the latter from it; and if it is less, he may retain the legacy in part discharge of the debt.^(e) And when a clause in a will fails to operate as an extinguishment of a debt, and is merely a bequest of a legacy; in this case, if the legatee dies in the life-time of the testator, a Court of Equity holds that the legacy is lapsed, and that the debt still subsists, and may be claimed against the estate of the debtor.^(f)

A clause in a will was construed to extinguish a debt in the following case of *Sibthorp v. Moxom*. A person by her will gave 10*l.* a-piece to [*470] the legatees for mourning, and afterwards "said, "I likewise forgive my son-in-law R. C. a debt of 500*l.* due to me upon bond, and all interest that shall be due for the same at my decease, and desire my executor to deliver up the bond to be cancelled;" and she made her son J. P. sole executor. R. C. having died intestate in the life-time of the testatrix, a question was made, whether the clause was of a legatory nature, or to operate by way of extinguishment. Lord Hardwicke was of opinion, that it was an extinguishment of the debt, and should enure to the benefit of the representative of the person whose debt it was; and his Lordship decreed the bond to be delivered up to the administratrix of R. C. to be cancelled.^(g)

A testamentary clause, which bequeathed a legacy to a debtor of the testator, was, in *Wilmot v. Woodhouse*, held not to amount to an extinguishment of the debt. In this case, the will of Admiral B. contained the following bequest: As I have paid and advanced considerable sums of money for my son J. B., and my daughter Lady W., I direct that my trustees and executors shall pay, within twelve months after my death, the sum of 2000*l.* to my said daughter Lady W. Lady W. was the widow of the testator's son J. B., and the testator had lent to her 800*l.*, on the security of her bond. She survived the testator, and married the plaintiff, and he on her death procured letters of administration to her. The defendant was the executor of Admiral B., and, on being applied to by the plaintiff for his late wife's legacy, insisted on deducting from it the 800*l.* due on bond. This raised the question, whether the bequest amounted in equity to a release of the bond. And Lord Loughborough decided that it did not. "A gift of a legacy," his Lordship said, "may certainly be so framed, as to be a release of a demand, but it must be clear. But this case can be raised no higher than an absence of intention; and a mere absence of intention can never be construed into a release. My opinion therefore is, that the defendant has a right to have the amount of the bond deducted."^(h)

[*471] In *Elliot v. Davenport*,⁽ⁱ⁾ *Toplis v. Baker*,^(j) *Maitland v. Adair*,^(k) and *Izon v. Butler*,^(l) a testamentary clause, that gave a legacy to a debtor of the testator, was construed not to operate as an extinguishment of the debt, but to be merely a bequest of

(e) *Jeffs v. Wood*, 2 P. W. 128; *Ranking v. Barnard*, 5 Madd. 32. See *Gould v. Adams*, 1 Vern. & Scriv. 258.

(f) *Elliot v. Davenport*, 1 P. W. 83, 2 Vern. 521; *Toplis v. Baker*, 1 Cox, 118, 1 P. W. 5th ed. 86, n.; *Maitland v. Adair*, 3 Ves. 231; *Izon v. Butler*, 2 Price, 34.

(g) 3 Atk. 580; *Sibthorp v. Moxom*, 8 C., 1 Ves. 49, cited 2 Cox, 121.

(h) 4 Bro. C. C. 227.

(i) 1 P. W. 83, 2 Vern. 521.

(j) 1 Cox, 118; 1 P. W. 5th ed. 86, n.

(k) 3 Ves. 231.

(l) 2 Price, 34.

a legacy; and, the legatee having died in the testator's life-time, the Court held that the legacy was lapsed; and the consequence seems to have been, that the debt subsisted, and was payable out of the legatee's, or debtor's, estate. In *Maitland v. Adair*, the will of J. A. contained the following words:—"I devise to my brother, the Rev. Mr. A., 2000*l*. I also return him his bond for 400*l*., with interest due thereon, which he owes me." It appeared by the Master's report, that the bond mentioned in the will was a joint bond, in the Scotch form, by the testator's brother and his son T. A. And on the question, whether the disposition of the bond by the will amounted to a release, or was only a legacy, and therefore lapsed by the death of the testator's brother in his life-time, the bond remaining in force against T. A. the co-obligor and executor of his father, Lord Loughborough held, that the words in the will amounted to a legacy only, which was lapsed; his Lordship saying, "There is not the least doubt as to the bond. It is distinctly a legacy to the brother. There is no foundation therefore for T. A. to have the bond delivered up."^(m) In *Izon v. Butler*, a bill was filed by I., who had been the partner in trade, and T. W., who was the son and executor, of T. W., against the executors of C. A., to compel them to give up to be cancelled a joint bond, which had been entered into by the partners, I. and W., to C. A. In 1777, 500*l*. was borrowed of C. A., for which I. and T. W. (the father of the plaintiff T. W.) gave to her their joint bond. In 1805, C. A. made her will, which contained the following clause:—"I remit and forgive to Mr. T. W., the elder, the sum of 500*l*., which he stands indebted to me on his bond, and I direct said bond to be delivered up to him and cancelled." The testatrix died in 1810; T. W. the elder died in 1807. The interest on the bond had been duly paid by I. and W. (the obligors) during W.'s life, and by I. ever since his death, to C. A., the testatrix, until her decease. The Court held, that the clause in the will amounted [*472] to a legacy; and decided, that "the bequest to W. was [a] personal legacy, intended for his benefit only, and that it must follow the nature of legacies in general; and, consequently, that the party demanding the bond to be delivered up is not entitled to the prayer of the bill, the legacy having lapsed by the death of W. in the life-time of the testatrix."⁽ⁿ⁾

In *The Attorney General v. Holbrook*, the will of T. H., made in 1810, contained the following clause:—"And, moreover, I bereby forgive the bond debt, both principal and interest, due to me, and entered into by J. W. and my brother J. H., with and for him, for the said J. W.'s paying to me the principal sum of 4000*l*., and interest at 4*l*. per cent., and do order the said bond at my decease to be delivered up and cancelled." The testator died in August, 1811. By the bond referred to in the will, J. W. and J. H., as surety for J. W., became jointly and severally bound to the testator in 8000*l*., with a condition for the payment by J. W. and J. H., or either of them, their or either of their executors or administrators, to T. H., his executors, administrators, or assigns, of 4000*l*. on the 1st of January, 1794, with interest at four per cent. The interest was paid by J. W. to T. H., the testator, in his life-time, to the time of the death of J. W., which happened in 1807,

(m) 3 Vea. 231, cited 2 Price, 43.

(n) 3 Price, 34.

and from that time by his executors to the 1st of January, 1811. On this case it was decided, that the clause in the will amounted to a legacy to J. H., and therefore that such legacy was liable to the payment of the legacy duty, payable by a person standing in the relation of a brother to the testator.(o)

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*CHAPTER XXXVII.

OF AN EXECUTOR'S ALIENATION OF ASSETS.

SECT. I. *Of the General Power of an Executor before Probate.*II. *Of an Executor's Power, at Law and in Equity, over Assets.*III. *Of taking Assets in Execution for the Private Debt of the Executor.*IV. *Of following Assets; and of the Interference of Equity against an Executor's Disposal of them.*

SECTION I.

OF THE GENERAL POWER OF AN EXECUTOR BEFORE PROBATE.

WITH some exceptions, and, in particular, relative to an action or suit,(a) it may be stated, that an executor derives his power from the will itself, and not from the probate of it.(b) Before probate he is called, and is, executor;(c) and, by the death of the testator, the property of his goods is cast upon and vested in the executor.(d) Before probate he may take possession of the testator's chattels personal,(e) or his terms of, [*474] or *leaseholds for, years;(f) and may receive debts due to the testator, and give a sufficient receipt for them.(g) Be-

(o) 3 Y. & Jerv. 114.

(a) Plowd. 278 a., 280; 5 Co. 28 a.; 9 Co. 38 a.; Co. Litt. 292 b.; 1 Rol. Abr. 917, A. 2; 1 Freem. 520; 11 Mod. 39, 41; 1 Salk. 301, 302, 303, 307; 1 Durn. & E. 480; 3 P. W. 351; 1 Atk. 461; 2 Atk. 285, 286; Wentw. Off. Ex. ch. iii.; Humphreys v. Ingledon, 1 P. W. 752; Comber's case, ib. 766; Duncombe v. Walter, 1 Freem. 539.

(b) 9 Co. 38 a.; 1 Salk. 302; Com. 151; 1 Freem. 520; 1 Durn. and E. 480; 3 Barn. and Ald. 365; 5 Barn. and Ald. 746; 1 Atk. 461; 1 Crompt. and Jerv. 369; Wentw. Off. Ex. ch. iii. See also 4 Bing. 704, and Parten v. Baseden, 1 Mod. 213.

(c) Plowd. 280; 11 Mod. 39.

(d) Plowd. 280, 281; 1 Salk. 302, 307; 1 Durn. and E. 480; 8 Barn. and C. 335; Adams v. Cheverel, Cro. Jac. 113; Woolley v. Clark, 5 Barn. and Ald. 744, 1 Dowl. and Ryl. 409.

(e) 1 Salk. 301; Wentw. Off. Ex. ch. iii. See also 2 Ball and B. 492.

(f) Anon. 3 Dyer, 367 a., Ca. 39; The King v. The Inhabitants of Stone, 6 Durn. and E. 295.

(g) 9 Co. 38 a.; 11 Mod. 41; 1 Salk. 301, 306; 1 Atk. 461; 2 Atk. 285; Stokes v. Porter, Mo. 14.

fore probate also he may pay debts;(*h*) and assent to,(*i*) or, it is presumed, pay legacies; dispose of the testator's personal estate,(*j*) as leaseholds for years;(*k*) and exercise many other parts of his duty.(*l*)

In *Allen v. Dundas*, where a debtor to a person, who died intestate, paid his debt to one, who had obtained probate of a forged will, and which will and probate were afterwards annulled by the Prerogative Court of Canterbury, it was decided, that the administrator of the intestate could not support an action to compel the debtor to pay his money a second time; a decision which the Court grounded on the circumstances, that the probate was the judicial act of a Court having competent jurisdiction, and that, therefore, the money was paid to a person, who had at the time a legal authority to receive it.(*m*) And in a late case, in which, on the discovery of a second will, the probate of an earlier will was revoked, and a probate of the second will obtained, it seems to be admitted, that a creditor would be protected, who had, while the first probate was unrepealed, paid a debt to him, by whom that probate was irregularly obtained.(*n*) Although an executor may before probate sell his testator's personal property, yet to prove, in a Court of Law, the executor's title to sell, it is not sufficient to offer the will in evidence, but it is necessary to produce the probate of it.(*o*)

*SECTION II.

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OF AN EXECUTOR'S POWER, AT LAW AND IN EQUITY, OVER ASSETS.

IMMEDIATELY on the death of the testator,(*p*) and consequently before the will is proved,(*q*) the executor is, for the purpose of enabling him to execute his trust,(*r*) as to pay the testator's debts,(*s*) empowered by his office to dispose of the testator's personal estate,(*t*) as by sale,(*u*) and, in a great variety of cases, by mortgage,(*v*) or pledge.(*w*) And if more than one executor is appointed, each is, independently of the rest,

(*h*) *Wolfe v. Heydon*, Hutt. 31; *Wangford v. Wangford*, 11 Mod. 41—Wentw. Off. Ex. ch. iii., 14th ed. p. 81.

(*i*) 1 Salk. 301; Wentw. Off. Ex. ch. iii., 14th ed. p. 82; *Anon.* 2 Freem. 23.

(*j*) Plowd. 280; 1 Salk. 301; 1 P. W. 768; 3 Atk. 239; *Pinney v. Pinney*, 8 Barn. and C. 335. See also 2 Ball and B. 492.

(*k*) 1 Atk. 461; 3 Atk. 239.

(*l*) 5 Co. 28 a.; 1 Salk. 301, 302, 307. Generally on acts that may be done before probate, see Wentw. Off. Ex. ch. iii., and 11 Vin. Abr. 202—205.

(*m*) 3 Durn. and E. 125, which overrules *Greves v. Weigham*, 1 Rol. Abr. 919, and *Anon.* Com. 150. "The case in Com. seems to be grounded on a false principle, namely, that the probate of a will gives no authority to the executor." By *Grose, J.*, 3 Durn. and E. 132.

(*n*) *Woolley v. Clark*, 5 Barn. and Ald. 746.

(*o*) *Pinney v. Pinney*, 8 Barn. and C. 335.

(*p*) 4 Durn. & E. 644; 5 Barn. & Ald. 746.

(*q*) *Mead v. Lord Orrery*, 3 Atk. 239.

(*r*) 4 Durn. & E. 644; 17 Ves. 154.

(*s*) 4 Durn. & E. 644; 2 P. W. 148, 149.

(*t*) 4 Durn. & E. 644.

(*u*) 2 P. W. 148, 149; Barn. Ch. Rep. 81; 1 West Cas. T. Hardw. 497; 1 Atk. 463; 17 Ves. 154.

(*v*) *Humble v. Bill*, 2 Vern. 444; *Savage v. Humble*, S. C., 3 Bro. P. C. ed Toml. 5; *Mead v. Lord Orrery*, 3 Atk. 235, 240; *Scott v. Tyler*, 2 Dick. 725; *Bonney v. Ridgard*, 1 Cox, 145, 148; *Watkins v. Cheek*, 2 Sim. & St. 205. See *Andrew v. Wrigley*, 4 Bro. C. C. 125, 138.

(*w*) 2 Dick. 725; 17 Ves. 154, 159; 4 Madd. 357.

invested with the like power, and in consequence may exercise it by himself alone, and without the concurrence of any other executor of the will.(x)

[*476] On a sale of assets by an executor, the purchaser is, generally *speaking, absolved from all inquiry with respect to debts or legacies,(y) and may presume the sale is made for the payment of debts, or other purpose, for which the law gives an executor the power of sale;(z) and, also, in general cases, the like presumption may be made, where the alienation is by mortgage,(a) or deposit,(b) or pledge.(c) With reference to a mortgage, Sir R. P. Arden has said, "Mortgaging is not the natural way of paying debts, though in some cases it may be the most proper way; but it would lead to an inquiry as to the circumstance of the testator's estate."(d) On a sale, or other alienation, that may be presumed to be made in performance of the executor's duty, the purchaser, or alienee, is not bound to see to the executor's application of the money;(e) except, possibly, in some instances of a particular trust created of the personal estate.(f)

An executor's power to alien assets extends to an equitable as well as [*477] to a legal estate;(g) and it is of no consequence, *with reference to this power, whether the testator's personal estate is bequeathed upon a trust, or not.(h)

In *Hall v. Hallet*, a purchase of assets by an administrator was set

(x) *Anon.* 1 Dyer, 23 b., Ca. 146; *Pannel v. Fenn*, Cro. Eliz. 347; *Kelsock*, v. *Nicholson*, ib. 478, 496, 2 Rol. Abr. 46; *Bacon v. Bell*, Toth. 87; *Farr v. Newman*, 4 Durn. & E. 632; *Hudson v. Hudson*, 1 Atk. 460; *Jacomb v. Harwood*, 4 Ves. 267, 268; *Scott v. Tyler*, 2 Dick. 712, 725, cited 14 Ves. 360; *M'Leod v. Drummond*, 14 Ves. 354, 355. On a similar power in the case of administrators, see *Hudson v. Hudson*, 1 Atk. 460, 1 West Cas. T. Hardw. 155, and *Jacomb v. Harwood*, 2 Ves. 267, 268, and *Willan*, v. *Fenn*, there cited, and, in 1 West Cas. T. Hardw. 159 n., stated from Mr. Sergeant Hill's Viner. See also *Shepp. Touchst.* 484, 485. Sir W. Blackstone, speaking of the office and duty of executor's and administrators, says,—“These in general are very much the same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor; and, secondly, that an executor may do many acts before he proves the will, but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will, and not from the probate; the latter owes his entirely to the appointment of the ordinary.” 2 Bl. Com. 507. And to the like effect, is the observation of *Abbott, C. J.*, on the difference mentioned,—“There is a manifest distinction between the case of an

administrator and an executor. An administrator derives his title wholly from the Ecclesiastical Court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. An executor, on the other hand, derives his title from the will itself, and the property vests in him from the moment of the testator's death.” 5 Barn. & Ald. 745. Generally on similarities and distinctions between executor and administrator, see *Wentw. Off. Ex. ch. xxi.*, and *Wankford v. Wankford*, 1 Salk. 299.

(y) 2 Kenyon, pt. 2, p. 58; 4 Madd. 357; 2 Sim. & St. 205; *Watts*, or *Mutts*, v. *Kancie*, Toth. 77, 161.

(z) 3 Atk. 240; 17 Ves. 154, 159; 4 Madd. 357; 2 Sim. & St. 205.

(a) 3 Atk. 240; 1 Cox, 148; 2 Sim. & St. 205.

(b) 17 Ves. 159.

(c) 4 Madd. 357.

(d) 4 Bro. C. C. 138.

(e) 1 Cox, 147, 148; 2 Dick. 725; 17 Ves. 154; 2 Sim. & St. 205; *Watts*, or *Mutts*, v. *Kancie*, Toth. 77, 161.

(f) Barn. Ch. Rep. 81; 17 Ves. 161, 163. See also 3 Atk. 239.

(g) *Nugent v. Gifford*, 1 Atk. 464, 1 West Cas. T. Hardw. 497, cited 17 Ves. 163; *Scott v. Tyler*, 2 Dick. 712, 2 Bro. C. C. 431, cited 14 Ves. 360; *M'Leod v. Drummond*, 14 Ves. 360.

(h) 17 Ves. 161.

aside, and the administrator and his trustee were turned into trustees for the benefit of the intestate's family.(i)

An executor cannot by his will dispose of assets.(j) On his death, they devolve to the testator's personal representative;(k) who may be, if the executor makes a will, his executor therein named,(l) or, if he dies intestate, an administrator *de bonis non* of the testator.(m) If on the death of a testator, administration with his will annexed is granted, when this administrator dies, his executor is not the representative of the first testator, but he, to whom administration *de bonis non* of the first testator is granted, is his representative.(n)

In *Pinney v. Pinney*, an executor before probate sold a personal chattel to the plaintiff; and, in an action of trover, it was held, that, to prove the title of the plaintiff, it was necessary to produce the probate of the will; that the production of the will itself was not sufficient for the purpose.(o)

In *Franklin v. The Bank of England*, the Court of King's Bench decided, that, under the circumstances of the case, the executor had a right of action against the Bank, for not permitting the transfer by him of a sum of stock, which his testator had specifically bequeathed upon certain trusts, and to which bequest the executor had not assented.(p)

If a lease for years made to A. contains a condition, that A. is not to assign the term without the license of the lessor, it appears that, in this case, the devolution of the term at A.'s death to his *executors is not such an alienation, as will create a forfeiture of [*478] the lease; that the terms of the condition are construed to confine the restraint to an assignment by A. himself only; and that therefore his executors may dispose of the lease, without incurring a forfeiture.(q) These appear to be the points determined in *Seers v. Hind*, in which it was a question, whether executors were warranted in disposing of a lease, as assets of the testator, where there was a proviso against alienation by the lessee. Lord Thurlow said, "If A. lets a farm to B., with covenant not to alien, and B. dies, may not his executors dispose of it? I think it has been determined that they may; and I have always taken it as clear law. It is an alienation by the act of God. I remember Lord Camden entered into the question much in the same way. He took it to be clear law, that an alienation by death could not be a forfeiture. In case of a lease for years to A., it goes to his executor, not by way of limitation, as in the case of a remainder over, &c., but it goes to him as coming in the place of the lessee. I understood it to be well settled, as I have stated." And here his Lordship added, "But I do not mean to lay down, that a man may not by a clause in his will provide, that, in case of a devolution to executors, it shall not be alienable by them; but it must be very special for that purpose."(r)

(i) 1 Cox, 134, 139.

(j) Wentw. Off. Ex. ch. vii., 14th ed. p. 193; 4 Durn. & E. 628, 629; *Bransby v. Grantham*, Plowd. 525.

(k) Plowd. 525, 526.

(l) Plowd. 525; 1 Atk. 461; 2 Bl. Com. 506; Went. Off. Ex. ch. xx.

(m) 4 Durn. & E. 628; 2 Bl. Com. 506.

(n) *Cubridge v. Boatwright*, 1 Russ. 549.

(o) 8 B. & C. 335.

(p) 9 B. & C. 156; 4 Mann. & Ryl. 11. See S. C., 1 Russ. 575.

(q) *Parry v. Harbert*, 1 Dyer, 45 b.; Anon. ib. 65 b., Ca. 8. See also 2 Durn. & E. 429; and *Cox v. Brown*, 1 Ch. Rep. 170.

(r) 1 Ves. jun. 295. See also *Cox v. Brown*, 1 Ch. Rep. 170.

It appears, however, that the condition of a lease for years may be broken by an executor's, or, as the case may be, administrator's assignment of the term, if the condition expressly extends to executors or administrators. Sir William More's case is thus reported,—“A lease is made for years, upon condition that the lessee, his executors, or assigns, shall not alien without assent of the lessor. The lessee dieth intestate, and the ordinary grants administration to J. S., who assigneth without license. It was adjudged that the condition was broken, for he is an assignee in law.”^(s) And in agreement with this case seems [*479] to be *Roe v. Harrison*, where a lease for years contained a proviso, that in case the lessee, his executors, or administrators, should at any time during the term set, let, or assign over the premises, without the license of the lessor, the lease should be void, and it should be lawful for the lessor, his executors, administrators, and assigns, to enter. The administratrix of the lessee having underlet the premises for a part of the term, the condition was held to be broken; and a devisee of the lessor recovered possession by ejectment.^(t) On the part of the defendant, the administratrix, it was argued, that, in order to determine this underlease to be a forfeiture, “the Court must decide, that a proviso not to assign, on pain of forfeiting the lease, binds the executors and administrators of the lessee. But in the case of *Doe dem. Lord Stanhope v. Skeggs*, the Court were equally divided upon that question. And there are strong reasons why an assignment by an executor or administrator should not be considered as a forfeiture, because in many cases it may be absolutely necessary, for the purpose of paying the debts of the testator or intestate.”^(u) But on this argument it was observed by Ashhurst, J.,—“It was objected that this proviso not to assign does not extend to persons, who come into possession by operation of law, but only to prevent an assignment in fact by the party; and the case of *Lord Stanhope v. Skeggs* was cited. But there the term was taken in execution, and it does not apply to this case. Here it is impossible to argue against the express stipulation of the parties; there is no doubt but that it was competent to the parties to bind their representatives; and the covenant is, that neither the lessee, nor his executors, nor administrators, shall let, &c. Therefore, for the purpose of this assignment, this term never could be considered as legal assets in their hands. If indeed the word ‘executors’ had not been inserted in the proviso, but it had been confined to an assignment by the lessee himself, it might have been doubted [*480] whether the restriction would have extended to the present case.”^(v)

The condition of a lease for years will, it appears, be broken by the lessee's bequest of the term, if, among other instances of such bequest,^(w) the condition is, that “it shall not be lawful for the lessee to alien his term, without the assent of the lessor:”^(x) that “the lessee shall not devise the land, or assign over his term:”^(y) “if the lessee, his execu-

(s) *Cro. Eliz.* 26, and apparently cited in *Thornhill v. King*, ib. 757. See *Moor v. Farrand*, 1 *Leon.* 3.

(t) 2 *Durn. & E.* 425. See *Northcote v. Duke*, 2 *Eden*, 319, *Amb.* 511.

(u) 2 *Durn. & E.* 428.

(v) 2 *Durn. & E.* 429. See also ib. 430.

On *Doe dem. Lord Stanhope v. Skeggs*, see, farther, ib. 134, 135, 138, 140.

(w) *Parry v. Harbert*, 1 *Dyer*, 45 b; *Horton v. Horton*, *Cro. Jac.* 74, 1 *Roll. Abr.* 428, *V.* pl. 1, 2, and 844, *L.* pl. 3.

(x) *Knight v. Mory*, *Cro. Eliz.* 60.

(y) *Barry v. Stanton*, *Cro. Eliz.* 330.

tors, or assignees, do demise the lands for more than from year to year, that then the lease shall cease and be void." (z) A case is thus reported:—"A lease for years was upon condition, that the lessee should not grant over the land at will, or otherwise. He devised the same to his executors, who accepted the same only as executors, and not as devisees. And yet it was the opinion of the Justices, that the condition was broken, because he had done as much as lay in him to have devised the land." (a) But, according to another case,—“Lease was made to B., upon condition that he should not assign his term, without the assent of Lord W.: B. devised his term to his son and wife, and made them his executors; and in that case it was said, that if they had not been executors, the condition would have been broken.” (b) And it appears to have been agreed on another occasion,—“If lessee for years, on condition not to alien without the assent of the lessor, makes his executor, and devises it [the lease] to him; and the executor enters generally, the testator not being in debt to any one, this is a forfeiture of the condition.” (c) From the authorities that have been mentioned, it appears that in some instances a condition not to assign a lease may be broken, as *well by [*481] the lessee's devise of it to his executor, as by his devise of it to any other person. But from the two authorities last transcribed it may also perhaps be collected, that the condition will not be broken if the executor enters as executor, and not as devisee, and the devolution of the lease to the executor, and his power to dispose of it, are necessary for the payment of the lessee's debts. Yet this conclusion is opposed, it should be mentioned, by a farther case, in which it seems to have been held by three Justices,—If a lease for years be on condition not to devise it to any person, and the lessee devises the term to his executor for payment of his debts, “although this devise is void, because the law would have vested it in him for the same purpose, yet inasmuch as he has endeavoured to pass it by devise, this is a forfeiture.” (d) A lease contained a proviso for re-entry on breach of covenant, and a covenant by the tenant, that he, his executors, administrators, or assigns, would not assign, except by his or their will, without the license of the lessor. The lessee devised the lease to his widow, and appointed her and others his executors; and all his executors made an assignment of the lease. And on this case an opinion seems to have been expressed, that the assignment by the executors, not made by will, fell within the covenant, and not within the exception; that the lessee's assignment by will was good, and the assignment by the executors bad. (e)

It remains to notice the following case, which has occurred on relief in equity against an executor's forfeiture of a lease. In *Northcote v. Duke*, where a lease for years, determinable on lives, contained a clause of re-entry, if the lessee, his executors, administrators, or assigns, should let the premises for any longer term than seven years, without the license of the lessor; and the plaintiff being entitled under the will of his father, and being his executor, made a lease for fourteen years without

(z) *Berry v. Taunton*, Cro. Eliz. 331.
 (a) *Anon.* 3 Leon. 67; *Parry v. Herbert*, S. C., 4 Leon. 5.
 (b) *Lord Windsor v. Burry*, 1 Dyer, 45, b., n. (3).
 (c) *Dumpe v. Symma*, 1 Rol. Abr. 429.

See *Dumpe's case*, or *Dumpe*, or *Dumper*, v. *Symma*, 4 Co. 119 b., Cro. Eliz. 815.
 (d) *Burton v. Horton*, 1 Rol. Abr. 428, V. pl. 2.
 (e) *Lloyd v. Cripe*, 5 Taunt. 249, 254.

license; and the lessor threatening to bring an ejectment, Lord Northington on the plaintiff's bill to be quieted in possession, and to restrain [*482] the defendant from proceeding at law, expressed an opinion, that a Court of Equity might afford him this relief; and a principal ground of this opinion seems to be, that the executor had not notice of the condition; his Lordship saying, "the executor, who made this lease for fourteen years, took the general personal estate under the will, without knowing the particular circumstances relative to the lease of this estate. The lease itself appears to have been in the hands of another person; in this state of ignorance, he grants this lease for fourteen years." "The plaintiff taking the estate as executor is like the case of an heir taking a freehold, and ought to have notice of the condition, in order to affect his interest by way of forfeiture for breach of the condition." (f)

SECTION III.

OF TAKING ASSETS IN EXECUTION FOR THE PRIVATE DEBT OF THE EXECUTOR.

IN *Whale v. Booth*, a creditor of a testator was, in a Court of Law, not allowed to follow assets, which a creditor of the executors had, under a writ of *fi. fa.*, levied for satisfaction of his debt. The Court relied on the circumstances,—that the testator died three years before this transaction, and during all that time no demand was made by the testator's creditor; that such disposal of the assets was by execution and bill of sale; that the executors, by being parties to the bill of sale, assented to it; and that the bill so assented to was equal to a purchase, and the same as an alienation by the executors. And this decision was made, notwithstanding it was stated the creditor of the executor knew the goods were the goods of the testator; the Court considering that this circumstance did not make a fraud, as it was not stated such creditor knew the testator's debts were unpaid. (g)

[*483] In *Farr v. Newman*, a creditor of the husband of an executrix obtained judgment against him; and, for satisfaction of this debt, the sheriff under a writ of *fi. fa.* seized certain goods of the wife's testator. But before the sheriff sold such goods, and completed the execution, a creditor of the testator obtained judgment against the executrix; and, to levy this debt of the testator, delivered a *fi. fa.* to the sheriff; and he having returned *nulla bona*, or that there were not any goods of the testator in the hands of the husband and wife to be administered, it was decided that the testator's creditor might support an action against him for a false return. And the effect of this determination seems to be, that, upon the like facts as there occurred, and perhaps generally speaking, the assets of a testator cannot be seized in satisfaction of a pri-

(f) 2 Eden, 219, Amb. 511. See *Roe v. Harrison*, 2 Durn. & E. 425. And on relief in equity against an executor's forfeiture of a lease, see, farther, *Cox v. Brown*, 1 Ch. Rep. 170.

(g) 4 Durn. & E. 625, n., 4 Doug. ed. Frere & R. 36; cited 4 Durn. & E. 632, 641, 642, 645, 649, 650, 7 Ves. 168, 17 Ves. 154, 165, and Coop. 267.

vate debt of the executor. (h) But *Farr v. Newman* is not to be understood to create a universal rule, that the goods of a testator in the hands of his executor cannot be seized in execution for a debt due from the executor in his own right. (i) In *Ray v. Ray*, where an executor renewed a lease for years of his testator, and by which renewal it became assets in equity, although not at law, and afterwards a creditor of the executor seized this leasehold in execution for the executor's own debt, a Court of Equity, on a bill filed by a creditor of the testator, refused to interfere with the right at law, and to restrain by injunction a sale under the execution; the Court relying on the particular circumstances of the case, and especially on the length of time, between six and seven years, during which the plaintiff had forborne to claim his debt; he lying by, and not ever making any claim, until the creditor of the executor started up. (j)

*SECTION IV.

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OF FOLLOWING ASSETS; AND OF THE INTERFERENCE OF EQUITY AGAINST AN EXECUTOR'S DISPOSAL OF THEM.

- 1.—When Assets are aliened by the Executor.
- 2.—When Money is by the Executor laid out in a purchase of Land or other property.

1.—WHEN, for a valuable consideration, an executor disposes of the personal estate of the testator, and, as against the testator's creditors, this disposition is effected without fraud or collusion (h) between the executor and him to whom such disposition is made; at law, this disposal of the assets is valid, and a creditor of the testator cannot follow them. (i) Mr. Justice Buller has said, "At law, there is no such thing 'as a *fund* in the hands of an executor being the *debtor*; but the *person* of the executor, in respect of the assets which he has in his hands, is the debtor." (m) And to the like effect Lord Hardwicke has stated,—"By law, undoubtedly, the executor has power to dispose of and alien all the assets of the testator; and when he has done so, no creditor of the testator can, in point of law, follow those assets; for the demand is not at law a lien or charge upon the assets, but is a demand against the executor, in right of the testator, in respect of the assets, and so is a personal demand." (n) And on another occasion his Lordship observed,—"Creditors have a demand against an executor for the whole assets of the testator, after the account is made up, but not by way of specific lien on the

(h) 4 Durn. & E. 621; cited 17 Ves. 168, 169, and Coop. 267.

(i) Coop. 267.

(j) Ibid. 264.

(k) 4 Durn. & E. 644; 1 Atk. 463; 3 Atk. 237.

(l) 4 Durn. & E. 632, 644; 1 Atk. 463; 1 West Cas. T. Hardw. 496, 497; 3 Atk.

237. *Whale v. Booth*, 4 Durn. & E. 625, n., 4 Doug. ed. Frere & R. 36; cited 4 Durn. & E. 632, 641, 649, and 17 Ves. 154 and 165.

(m) 4 Durn. & E. 687.

(n) 1 West Cas. T. Hardw. 496, 497; 1 Atk. 463; 2 Ves. 269.

[*485] assets.”(o) And to these opinions Lord Eldon has subscribed [*485] *by saying,—“ It is certrinly true, as laid down in *Nugent v. Gifford*,(p) that a creditor has no lien upon the assets.”(q)

When he, to whom, for a valuable consideration, an executor has disposed of assets, cannot at law be dispossessed of them, a person, who seeks in a Court of Equity to follow them, must, to enable this Court to interfere, disclose some sufficient equity.(r) To this purpose, with reference to the particular assignment by the executors in *Mead v. Lord Orrery*, Lord Hardwicke said,—“ If good at law, the question is, whether there are sufficient grounds to set it aside in equity, so as to enable the residuary legatee to follow the assets into the hands of the assignees.”(s) And, to the like effect, it seems to be said by Sir W. Grant in *McLeod v. Drummond*, where executors had pledged to the defendants certain bonds of the testator,—“ I presume that the plaintiffs have no legal means, by which they can compel the defendants to deliver to them the possession of the bonds, or to make compensation by damages for their value. If the plaintiffs have any legal remedy, it is unnecessary for them to come here: as if the defendants have obtained possession of the bonds by such a title, that they have no right at law to retain the possession, the whole amount of the sum secured by those bonds might be recovered in an action of detinue or trover. If, on the other hand, the defendants have the legal possession, of which they could not be deprived at law, this Court will not, except upon the same equitable ground, take it from them. Mere defect of title is not a ground for the interference of this Court.”(t)

An equity to follow assets in the hands of an alienee, who cannot at law be dispossessed of them, depends on the particular circumstances of each case.(u) There seems to be no “general *principle [*486] that an assignee or person taking security of an estate from an executor is not to be answerable;”(v) and, on the other hand, there appears to be no “general rule, that if an executor sell a term for years, or a chattel, for money owing by himself, that such sale shall be bad, or that chattels shall be affected, in the hands of a purchaser, with debts of the testator.”(w)

Particular circumstances did *not* furnish a sufficient equity to enable a Court of Equity,—in *Ewer v. Corbet*, to allow a specific legatee of a term of years to follow the term sold by the executor; in other words, to decree the purchaser to be a trustee for the legatee:(x) in *Burting v. Ston-*

(o) 3 Atk. 238. See also 1 Ves. 283.

(p) 1 Atk. 463.

(q) 17 Ves. 163. Lord Eldon appears to have inclined to the opinion, that, after all the testator's debts have been paid, the residuary legatee, who can call for a transfer in equity, has in equity a lien on the residue. 17 Ves. 163, 169, 170. See 3 Atk. 238.

(r) 2 P. W. 149; Amb. ed. Blunt, Append. 797; 1 Ves. 215; 2 Dick. 724, 725; 4 Ves. 42, 43; 17 Ves. 167. Generally on following assets, see *Nicholson v. Sherman*, 1 Ch. Cas. 57, 2 Freem. 181; *Stidolph v. Leigh*, 2 Vern. 75; *Hawkins v. Day*, Amb. ed. Blunt, 804; Ex parte *Morton*, 5 Ves. 449.

(s) 3 Atk. 240.

(t) 14 Ves. 359.

(u) *Taner v. Irvie*, 2 Ves. 469, cited 17 Ves. 164.

(v) 2 Ves. 469.

(w) 1 West Cas. T. Hardw. 498.

(x) 2 P. W. 148. See also *Langley v. Earl of Oxford*, Amb. ed. Blunt, Append. 797. These authorities accord with the judgment delivered in *Chancery in Humble v. Bill*, 2 Vern. 444; *Savage v. Humble*, S. C., 3 Bro. P. C. ed. Toml. 5, by which the decree in *Chancery* was reversed in the House of Lords; on which case, see 3 Atk. 241, 4 Bro. C. C. 137, and 17 Ves. 160, 161.

ard, to allow a general legatee to follow a term of years sold by the executrix:(y) in *Nugent v. Gifford*, to allow creditors under a marriage settlement to follow a sum of money, that, being due on a mortgage for years made in trust for the testator, the executor assigned for better securing certain bond debts due from the executor personally:(z) in *Elliot v. Merryman*, to allow creditors of the testator to follow terms of years sold by the executor:(a) in *Mead v. Lord Orrery*, to allow certain residuary legatees to follow a mortgage assigned by executors; in other words, to relieve them against such assignment, and to compel an account; the assignment having been made as a security for a receivership, to which one of the executors had been appointed:(b) in *Taner v. Ivie*, to charge and make answerable a party, to whom an executor had assigned a mortgage:(c) in *Bonney v. Ridgard*, to allow specific legatees of leaseholds for years to follow them in the possession of a party, to whom the executrix had mortgaged them:(d) in *M'Leod v. Drummond*, to decree bankers to deliver to a legatee certain bonds specifically bequeathed to her, and which an executrix had by deposit, and without assignment, pledged to the bankers, as a security for her own private debt, namely, monies by them already advanced, or to be advanced, to her:(e) a suit which, however, ended by compromise:(h) in *Hill v. Simpson*, to permit general pecuniary legatees to follow certain stock or public funds, which an executor of an executrix of the original testator had transferred to his the executor's bankers, as a security for his own private debt, that is, for such sums as he then owed, or might afterwards owe, them:(i) in *Downes v. Power*, to restrain the defendants from proceeding at law against the plaintiffs, for the recovery of the amount of certain promissory notes; the circumstances of the case being, that a purchase(j) by an executrix of the stock in trade of the testator, J. C., she and her brother passed the notes in question, payable to M. C. as executor of J. C.; and it was at the same time agreed, that the notes should be deposited with M. C., in trust for the children of the testator, pursuant to his will; and these notes, so made payable to M. C. as executor, M. C. afterwards lodged

(y) 2 P. W. 150.

(z) 1 West Cas. T. Hardw. 494, 1 Atk. 463, 2 Ves. 269; cited 3 Atk. 241, 1 Ves. 215, 2 Ves. 469, 4 Bro. C. C. 136, 7 Ves. 166, and 17 Ves. 163, 164.

(a) Barn. Ch. Rep. 78, 81, 83, 2 Atk. 41, cited 1 Cox, 147.

(b) 3 Atk. 235; cited 1 Cox, 148, 4 Bro. C. C. 136, 7 Ves. 167, and 17 Ves. 164.

(c) 2 Ves. 466.

(d) 1 Cox, 145, 148.

(e) 14 Ves. 353, 17 Ves. 152.

(f) 2 Vern. 616; cited 1 Atk. 464, 1 West Cas. T. Hardw. 498, 499, 3 Atk. 240, 4 Bro. C. C. 137, and 17 Ves. 161, 162.

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The Anonymous case noticed Prec. Ch. 434, and cited 4 Bro. C. C. 137, and 17 Ves. 162, is probably *Crane v. Drake*, before Lord Cowper in 1708 (2 Vern. 3d ed. 616, n.), and who, when in 1715 he decided *Pagett v. Hoskins*, Prec. Ch. 431, was a second time Chancellor.

(g) 2 Dick. 712, 715, 724, 2 Bro. C. C. 431, 487; cited 7 Ves. 169, 14 Ves. 360, 361, and 17 Ves. 166—168.

(h) 2 Bro. C. C. 489; 17 Ves. 166.

(i) 7 Ves. 152; cited 13 Ves. 104, 14 Ves. 354, 361, and 17 Ves. 169.

(j) See *Hall v. Hallet*, 1 Cox, 134, 139.

[*488] with an agent of the defendants, P. & Co., as a security for cash to be advanced *by them to M. C., for a purpose totally foreign to the trusts he was to discharge, namely, for the purpose of extending the trade he was carrying on on his own account.(*k*)

Particular circumstances *did* also furnish a sufficient equity to enable a Court of Equity,—in *Bonney v. Ridgard*, to allow specific legatees of leaseholds for years to follow them in the possession of a purchaser from the executrix; that is, to turn the purchaser into a trustee for the legatees; but in this case the Court by analogy to the statute of Limitations, refused relief, on the ground of the length of time which had elapsed between the plaintiffs' right occurring, and their prosecuting that right:(*l*) and in *Andrew v. Wrigley*, to allow specific legatees of leaseholds for years to follow them in the possession of purchasers from an administratrix with the will annexed; but in this instance also the Court refused relief, by reason of length of time; as here the plaintiffs, who were legatees after the death of the administratrix, to whom the premises were bequeathed for life, did not apply for relief, until after the death of the administratrix, and the lapse of twenty years from the time of the sale.(*m*)

On the interposition of a Court of Equity against an executor's alienation of assets, the cases and authorities appear to warrant these general conclusions:—that the Court will not interfere merely on the ground, in the case of a sale or mortgage, that the purchaser or mortgagee had notice of the will,(*n*) or that the property was assets,(*o*) or was specifically bequeathed:(*p*) where the alienee has, for a valuable consideration, gained the legal estate, it must be a very powerful equity to take it from him;(q) where the alienation is made for the executor's own benefit, an argument in support of it is, that the executor was the sole residuary legatee,(*r*) or [*489] one of several residuary legatees;(s)*and, if there are more executors than one, that they all joined in the alienation, although one only was interested in it;(t) and, where such alienation is made by an executor and residuary legatee, and some time, as more than two years, after the testator's death, a farther argument in support of it may be drawn from a supposition, that the executor might in that period, by advances on account of the trust, have entitled himself to reimbursement out of the assets:(u) where the property is pledged by the executor, an argument to sustain the transaction is, that the pledge was made, not for a debt antecedently due by the executor, but for money advanced at the time of the pledge:(v) with reference to a pledge, a Court of Equity excludes the broad and general proposition, that no man can advance money upon a bond, or other chose in action, of the testator, without implying a fraudulent collusion with the executor to misapply the assets:(w)

(*k*) 2 Ball & B. 491.

(*l*) 1 Cox, 145; also stated 4 Bro. C. C. 130; and cited *ib.* 138, and 17 Ves. 165.

(*m*) 4 Bro. C. C. 125.

(*n*) 2 P. W. 149; 3 Atk. 238; 4 Madd. 356.

(*o*) 1 Atk. 464; 1 West Cas. T. Hardw. 497, 498.

(*p*) 2 P. W. 149; Amb. ed. Blunt, Append. 797; 4 Madd. 357.

(*q*) 3 Atk. 238.

(*r*) 4 Bro. C. C. 136; 17 Ves. 163, 164.

(*s*) 3 Atk. 241; 4 Bro. C. C. 136, 137; 7 Ves. 167; 17 Ves. 164.

(*t*) 3 Atk. 241, 242, 244; 4 Bro. C. C. 137; 7 Ves. 167.

(*u*) 7 Ves. 166, 167, 168; 14 Ves. 363. See 17 Ves. 155, 156.

(*v*) 2 Dick. 725; 14 Ves. 355, 361, 362; 17 Ves. 155, 170; 4 Madd. 357, 358.

(*w*) 14 Ves. 363.

the remedy of a legatee, who is deprived of his legacy by a wrongful alienation by the executor, is against the executor himself. (x)

A cause of the interference of equity is some fraud or collusion between the executor and alienee; (y) as, if the alienee is "a party and consenting to, and contriving, a devastavit;" (z) or if, in the case of a sale, it is made at a nominal price, (a) or fraudulent undervalue. (b) And in some cases, perhaps, a cause for the interposition of equity may be, a particular trust, on which the property is bequeathed by the testator. (c) And, at least in some instances, an argument for the like interference, in favour of a "specific legatee, is, that the sale was to one, who [*490] had notice there were no debts, or that all the debts were paid. (d)

In the case of a pledge of a personal chattel, farther arguments for the interposition of equity are,—that the pawnee must know it is the property of the testator: (e) that he took it as a pledge for the private debt of the executor, (f) or debt incurred in a transaction having no reference to the testator's affairs: (g) that he took it as a pledge, not for money then lent or advanced at the time, but as a pledge for a debt contracted by the executor before, (h) or by way of security for future advances: (i) that the pledge was made by deposit only, and not by assignment of the chattel: (j) that it was made within a very short time, as in a month, after the testator's death: (k) that the pawnee acted on the faith of the executor's representation, by which he was induced to believe, that by the will the property pledged was actually the executor's own, and that the pawnee was guilty of gross negligence in not looking at the will, instead of taking the executor's word as to his right under it. (l)

As the result of the authorities, Sir John Leach has stated,—“Every person, who acquires personal assets by a breach of trust or *devastavit* in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust, by buying, or receiving as a pledge, for money advanced to the executor at the time, any part of the personal assets, whether specifically given by the will or otherwise, because this sale, or pledge, is held to be, *primâ facie*, consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust, by buying, or receiving in pledge, any part of the [*491] *personal assets, not for money advanced at the time, but in satisfaction of his private debt, because this sale or pledge is, *primâ facie*, inconsistent with the duty of an executor. I preface both these propo-

(x) 2 Vern. 445; 2 P. W. 149; 7 Ves. 165.

(y) 1 West Cas. T. Hardw. 497; 1 Atk. 463; 1 Cox, 147; 2 Dick. 725; 17 Ves. 167; 3 Atk. 240; 2 Ves. 268, 269; Barn. Ch. Rep. 81.

(z) Crane v. Drake, 2 Vern. 616, 18 Vin. Abr. 131, in marg.; cited 1 West Cas. T. Hardw. 498, 3 Atk. 240, and 17 Ves. 162.

(a) 2 Dick. 725; 17 Ves. 167.

(b) 2 P. W. 149; Amb. ed. Blunt, Appendix. 797; 2 Dick. 725; 17 Ves. 167.

(c) Barn. Ch. Rep. 81; 3 Atk. 239; 17 Ves. 161, 162.

(d) 2 P. W. 149; Amb. ed. Blunt, Appendix. 797; 17 Ves. 162.

(e) 2 Dick. 725; 7 Ves. 169; 14 Ves. 362; 17 Ves. 168.

(f) 2 Dick. 726; 7 Ves. 168; 14 Ves. 354.

(g) 2 Dick. 725.

(h) 2 Dick. 725; 7 Ves. 168; 14 Ves. 354, 355, 361, 362; 17 Ves. 165, 170; 4 Madd. 358.

(i) 7 Ves. 163, 168; 14 Ves. 354; 17 Ves. 170.

(j) 2 Dick. 725, 726; 14 Ves. 360; 17 Ves. 167.

(k) 7 Ves. 168; 14 Ves. 354, 361; 17 Ves. 170.

(l) 7 Ves. 170; 14 Ves. 361.

sitions with the term 'generally speaking,' because they both seem to admit of exceptions."(*m*) And the same learned Judge has elsewhere said,—“A mortgagee or purchaser from the executor, of a part of the personal property of the testator, has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies. But if the nature of the transaction affords intrinsic evidence, that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt, due from the executor to the mortgagee or purchaser, there such mortgagee or purchaser, being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies, as it would have been in the hands of the executor.”(*n*)

On the subject of the interference of a Court of Equity, it remains to notice the following cases:—

In *Taylor v. Hawkins*, where certain leasehold premises were specifically bequeathed to an executor, and he, in seven months after the testator's death, mortgaged the same, as security for a debt owing by himself personally, and for other sums to be advanced on his private account; and afterwards the premises were sold; the Court held, the mortgagees were entitled to be paid out of the purchase-money, before a bond creditor of the testator; the answer of this creditor not saying, he believed the mortgagees knew there were debts of the testator unpaid, or containing any other ground of inquiry into fraud or collusion on the part of the mortgagees.(*o*) In *Keane v. Robarts*, where the defendants R. and De L. were held not to be responsible to legatees and creditors for assets, Sir J.

[*492] Leach distinguished the case from one of purchase or pledge from the executors; saying, “It is the case of agents of *the executors receiving money by the authority of the executors, and remitting it to them in the course of their duty as agents, and in the proper forms of business, leaving the application of it to the purposes of the will wholly in the power of the executors.”(*p*) In *Cubbridge v. Boatwright*, the Court, on a bill filed by an administratrix *de bonis non* of C., set aside an assignment of a leasehold house, which H., an administrator with the will annexed of C., had made to secure an annuity, and also a subsequent sale of the house by H.'s executrix; on the grounds, that, under the circumstances of the case, it was impossible to say the property had been administered by H., and consequently, on H.'s death, it did not pass to H.'s executrix, but to the administratrix *de bonis non* of the original testatrix.(*q*) In *Drohan v. Drohan*, a Court of Equity set aside a lease of a farm, which a widow and administratrix had made at an undervalue, and to a lessee who had express notice, that the administratrix, and the children of the intestate by a former wife, had agreed to divide the property of the intestate, according to the Statute of Distributions, and that the administratrix was, by the children, called on to sell the intestate's interest in the farm.(*r*)

2.—The Statute of Frauds, 29 Ch. II., c. 3, enacts by section 7, that

(*m*) 4 Madd. 357.

(*n*) 2 Sim. & St. 205. See also *Lowther v. Lord Lowther*, 13 Ves. 104.

(*o*) 8 Ves. 209.

(*p*) 4 Madd. 332, 359.

(*q*) 1 Russ. 549.

(*r*) 1 Ball & B. 185.

"all declarations or creations of trusts of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing." But provides by its next section, "That where any conveyance shall be made of any lands or tenements, by which a trust shall or may arise or result by the implication or construction of law, then such trust shall be of the like force and effect, as the same would have been, if this statute had not been made."

If an executor lays out money, which is assets, in a purchase of land, a Court of Equity will not follow these assets into the land, if, in the consideration of the Court, there is not sufficient evidence to make the executor a trustee.^(s) But to prove that "the land was bought with the assets, and to create such a trust, parol evidence is [*493] admitted,^(t) and although the executor is himself dead.^(u) And if the evidence proves a trust, the Court will decree the executor to be a trustee for a legatee, or other party, entitled to the money laid out in the purchase.^(v)

In a case where certain stock belonging to a testator was sold out, and the money invested in South Sea stock, Lord Hardwicke, with reference to following the money, stated in the Court of Chancery,—“It has been objected, on the part of the plaintiff, that money has no ear-mark, and therefore upon that account the stock, which has been purchased, cannot be considered as part of the estate of Sir N. This objection has been enforced by saying, that if an executor sells part of a testator's estate, and converts the money into stock, a creditor of the testator shall not be allowed to follow that money into the stock wherein it was so converted, and consider the stock as assets in the hands of the executor, but shall only be allowed to charge the executor with a *devastavit*; and undoubtedly that is the general rule, not only at law, but in this Court likewise. But there are many cases wherein that rule does not hold in this Court, and the creditor shall be allowed to follow the stock specifically. And if stock belonging to a testator is given by his will subject to a contingency, the Court does not presume that the stock will always remain in the same plight. And if it is converted into other stock, the stock into which it is so converted shall be subject to the same contingency.”^(w)

(s) *Halcott v. Markant*, Prec. Ch. 168; *Kinder v. Miller*, *ibid*, 171; *Kendar v. Milward*, S. C., 2 Vern. 440.—2 P. W. 414. See *Heron v. Heron*, Prec. Ch. 163, 2 Eq. Cas. Abr. 744, and *Hooper v. Eyles*, 2 Vern. 480.

(t) Prec. Ch. 169; 2 Vern. 441; 1 Atk. 59, 60; Amb. 412; 10 Ves. 517; 2 Atk. 71.

(u) Prec. Ch. 169; 2 Vern. 440, 441; 1 Atk. 59.

(v) *Anon. Sel. Ca. Ch. 57*, 2 Eq. Cas. Abr. 749; *Balgney v. Hamilton*, Amb. 414; *Ryall v. Ryall*, 1 Atk. 59, also stated Amb. 413, and cited 10 Ves. 518. See also *Willis v. Willis*, 2 Atk. 71.

(w) *Batten v. Whorewood*, Barn. Ch. Rep. 422; *Waite v. Whorwood*, S. C., 2 Atk. 159.

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*CHAPTER XXXVIII.

OF THE PERSONAL LIABILITIES OF AN EXECUTOR.

- SECT. I. *A general View of the Subject of this Chapter.*
 II. *Of an irregular Preference of a Creditor.*
 III. *Of accepting Security in place of Payment of a Debt.*
 IV. *Of an Executor's Promise to pay a Debt.*
 V. *Of an Executor's Liability for Interest.*
 VI. *Of accounting for Profits made of the Testator's Estate.*
 VII. *Of Losses in case of Loan or Investment.*
 VIII. *Of parting with Property to a Co-Executor.*
 IX. *Of an Executor's Liability for Property placed with Bankers.*
 X. *Of an Executor's continuing the Trade of his Testator.*
 XI. *Of an Executor's Liability, where he is obliged to refund Money received, and afterwards paid away by him.*
 XII. *Of Submission to Arbitration.*
 XIII. *Of an Executor's Liability in certain instances of Trusts.*
 XIV. *Of an Executor's concurring in certain Acts.*
 XV. *Of Admission and Evidence of Assets.*
 XVI. *Of paying Legacies before Debts.*
 XVII. *Of instances where an Executor's Liability is not incurred.*
 XVIII. *Of a Clause of Indemnity in a Will.*

SECTION I.

A GENERAL VIEW OF THE SUBJECT OF THIS CHAPTER.

WHEN, by the wrongful act of an executor, assets are lost to a party, [*495] as a creditor or legatee, entitled to them, the executor *is, in technical language, said to have wasted the assets, or to be guilty of a *devastavit*.(a) This waste he may be compelled to make good out of his own property; as to either a creditor,(b) or legatee,(c) or to the person entitled to the residue of the testator's personal estate.(d)

Among other acts, which, at law, may be a *devastavit*, or may draw

(a) Doct. & St. Dial. 2, ch. 10, ed. 1709, p. 158; God. Orph. Leg. 2d ed. 203.

(b) Doct. & St. Dial. 2, ch. 10, ed. 1709, p. 158; Bro. Abr. tit. *Administrators*, pl. 50, tit. *Executors*, pl. 116.

(c) *Adye v. Feuillsteau*, 1 Cox, 24. See also *Watts v. Kancie*, Toth. 77.

(d) *Townsend v. Barber*, 1 Dick. 356; *Lowson v. Copeland*, 2 Bro. C. C. 156;

Powell v. Evans, 5 Ves. 839. In *Dyose v. Dyose*, 1 P. W. 305, it was held, on the particular circumstances of the case, that the residuary legatee should not suffer, by the *devastavit* there committed, more than in proportion with the other legatees. See *Humphreys v. Humphreys*, 2 Cox, 186, and 1 P. W. 5th ed. 306, n.

on an executor personal liability or loss,(e) it may particularly be mentioned, that it appears that by the decision of, or an opinion expressed in, a Court of Law, as distinguished from a Court of Equity, at law a *devastavit* may be committed, or the executor's personal liability or loss incurred,—by executing a release,(f) as a release of a debt owing to the testator,(g) or a release to an administrator *durante minore ætate* of all demands; and which administrator has at the time assets in his hands:(h) by paying a bond made on an usurious contract:(i) by paying a legacy before a debt of record; or by paying a legacy before a bond or simple contract debt, of which the executor has notice:(j) by letting interest on a debt grow in arrear, and then suffering judgment for principal and interest:(k) by appointing an agent, to receive *a debt, who receives it, but will not repay;(l) by, in certain [*496] cases, a conversion of the testator's property, as where the executor uses it as his own:(m) and, generally speaking, by, it is presumed, any expenditure, which, as against creditors, is inadmissible; as extravagant funeral expenses,(n) or money paid for clothes, and other necessities, and schooling provided, for the testator's children since his death.(o)

Among other instances,(p) it may be mentioned, that it appears, by the decision of, or an opinion expressed in, a Court of Equity, in equity a *devastavit* may be committed, or the executor's personal liability or loss incurred,—by neglecting to call in a debt, secured by bond to the testator,(q) or out on personal security:(r) by allowing interest to run on a debt, as on a debt by bond, when the executor has sufficient assets in his hands to discharge the principal of the debt;(s) by a conversion of, that is, by altering the nature of, the testator's estate:(t) by, perhaps it may be stated, losing a bond on which a debt is owing to the testator:(u) by paying out of his own pocket, and beyond the personal assets, bond

(e) Doct. & St. Dial. 2, ch. 10, ed. 1709, p. 158; Wentw. Off. Ex. ch. xiii; God. Orph. Leg. part 2, ch. 26; Bro. Abr. tit. *Executors*, pl. 173; 1 Rol. Abr. 927, S. pl. 4, 5; Keilw. 64 b.; 2 Brownl. & G. 185; 3 Mod. 240; 12 Mod. 573; 3 Salk. 125, tit. *Devastavit*, pl. 2; 2 Kenyon, part 1, p. 295; Carter v. Love, Mo. 358; Yate v. Alexander, Godb. 284. See also Woodcock v. Hern, Gouldsb. 142.

(f) Russel's case, 5 Co. 27.

(g) Anon. Dalis. 89, Ca. 4, Owen, 38, —Hob. 66. See also 1 Vern. 455; Russel's case, 5 Co. 27; and Kniveton v. Latham, Cro. Car. 490.

(h) Veghelman v. Kighley, 1 Anders. 138; Brightman v. Keighley, Cro. Eliz. 43; Kighley v. Kighley, 3 Leon. 102; Kittley's case, Godb. 29.

(i) 1 Brownl. & G. 33; Hob. 167; 3 Salk. 125, tit. *Devastavit*, pl. 1.

(j) Doct. & St. Dial. 2, Ch. 10, ed. 1709, p. 158; Bro. Abr. tit. *Administrators*, pl. 37, tit. *Executors*, pl. 116; Keilw. 63 b.; 3 Salk. 125, tit. *Devastavit*, pl. 2. See also 1 Mod. 175.

(k) Seaman v. Dee, 2 Lev. 39, 1 Vent. 198, 3 Salk. 125. See Anon. 2 Eq. Cas. Abr. 455, L. Ca. 4, and ib. 456, Ca. 6.

(l) Jenkins v. Plombe, 6 Mod. 93. See Pistor v. Dunbar, 1 Anstr. 107.

(m) Quick v. Staines, 2 Espin. 657, 1 Bos. & P. 293.

(n) 1 Salk. 296; God. Orph. Leg. 2d ed. 204; 2 Bl. Com. 508.

(o) Giles v. Dyson, 1 Stark. 32.

(p) Gibbs v. Herring, Prec. Ch. 49; Charlton v. Low, 3 P. W. 330; Keylinge's case, 1 Eq. Cas. Abr. 239; Duchess of Hamilton v. Ingleton, 11 Vin. Abr. 279, Ca. 53, 2 Eq. Cas. Abr. 456, Ca. 8; Horsley v. Chaloner, 2 Ves. 83, 85; Carsey v. Barsham, stated 1 Sch. & Lef. 344; Doyle v. Blake, 2 Sch. & Lef. 231.

(q) Lowson v. Copeland, 2 Bro. C. C. 156, cited 1 Madd. Rep. 298; Powell v. Evans, 5 Ves. 839. See Orr v. Newton, 2 Cox, 274, 276.

(r) 8 Ves. 467.

(s) Anon. 2 Eq. Cas. Abr. 455, L. Ca. 4; Anon. ib. 456, Ca. 6. See also Seaman v. Dee, 2 Lev. 39, 1 Vent. 198, 3 Salk. 125, pl. 6.

(t) Batten, or Waite, v. Whorewood, Barn. Ch. Rep. 422, 2 Atk. 159.

(u) Goodfellow v. Burchett, 2 Vern. 299.

debts of the testator:(v) by, in some cases, payment of legacies:(w) by, when a legacy is given to an infant, paying it either to the infant himself, or to his father during the infancy:(x) by, when a legacy is bequeathed [*497] to a married *woman generally, and not for her separate use, payment of it to herself, instead of to her husband:(y) by permitting specific legatees to retain or possess the effects specifically bequeathed to them, and which, to pay creditors, are afterwards required to make up a deficiency of assets.(z)

An executor has by a Court of Equity been held to be personally answerable for money as received by his agent, in a case where the testator directed E. P. to carry on his business, and the money received was debts in the trade due before the death of the testator, and which the executor permitted E. P. to get in, no intention that E. P. should collect them being apparent or hinted at in the will.(a)

An executor may in some cases be personally responsible for the loss caused to his testator's estate, if goods in the executor's possession become impaired, or are sold by him at an undervalue; or he omits to sell them at a good price, and afterwards a less sum only can be obtained for them.(b) And here it may be mentioned, that in *Hall v. Hallet*, Lord Thurlow, in noticing a sale of ships by an administrator, observed, "He sold many of the ships before their arrival, and before he could possibly know the most advantageous method of disposing of them. This could not be justified, but upon a very pressing occasion."(c) In *Crosse v. Smith*, where counsel contended, that, for damages done to goods, or for their loss by robbery, without default of the executor, he is not liable more than a common bailee, Lord Ellenborough scouted the idea, that in a

[*498] Court of Law an executor *might be considered a mere ordinary bailee; and took it to be clear, that no case at law had decided, "that an executor, once become fully responsible, by actual receipt of a part of his testator's property, for the due administration thereof, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means, which afford excuse to ordinary agents and bailees in cases of loss, without any negligence on their part."(d) In a Court of Equity, an execu-

(v) *Robinson v. Tonge*, 3 P. W. 398.

(w) *Hodges v. Waddington*, 2 Ch. Cas. 9; *Hawkins v. Day*, Amb. 160, and ed. Blunt, Append. 803, 1 Dick. 155, cited 3 Meriv. 554. See 3 Salk. 125, tit. *devastavit*, pl. 2; *Necton and Sharpe's case*, 1 Rol. Abr. 928, X. pl. 1, 2; *Nector and Sharp v. Gennet*, Cro. Eliz. 466.

(x) *Holloway v. Collins*, 1 Ch. Cas. 245; *Dyke v. Dyke*, Cas. T. Finch, 94; *Dagley, or Doyley, v. Tolferry*, 1 P. W. 285, 1 Eq. Cas. Abr. 300, cited 2 Atk. 81, and 3 Bro. C. C. 97; *Dawley v. Ballfrey*, Gilb. Eq. Rep. 103; *Phillips v. Paget*, 2 Atk. 80, cited 1 Ves. jun. 249; *Cooper v. Thornton*, 3 Bro. C. C. 96, 186; *Davies v. Austen*, 1 Ves. jun. 247, 3 Bro. C. C. 178; *Lee v. Brown*, 4 Ves. 362. The statute 36 Geo. III. c. 52, s. 32, empowers an executor to pay the lega-

cy of an infant into the Bank, with the privacy of the accountant-general of the Court of Chancery; *Whopham v. Wingfield*, 4 Ves. 630. On the application of dividends for an infant's maintenance and education, see stat. 1 Will. IV. c. 65, s. 32.

(y) *Palmer v. Trevor*, 1 Vern. 261.

(z) *Spode v. Smith*, 3 Russ. 511.

(a) *Pistor v. Dunbar*, 1 Anstr. 107.

(b) *Wentw. Off. Ex. ch. xiii.* 14th ed. p. 302; *Jenkins v. Plomba*, 6 Mod. 181.

(c) 1 Cox, 138.

(d) 7 East, 246, 255, 258, 3 Smith, 203. On destruction of assets by fire, see also *Holt v. Holt*, 1 Ch. Cas. 190, cited 1 Vern. 92, and 2 Vern. 57. And on the question, whether an executor is bound to renew his testator's policy of insurance against fire, see *Parry v. Ashley*, 3 Sim. 97, 100.

tor may, in some cases, not be personally answerable for a loss occasioned by his employment of an agent; as where the executor sends money to a person in the country, to pay the testator's debts there.^(e) In *Morley v. Morley* a trustee for an infant lost a sum of money by theft out of his house; and, in a Court of Equity, Lord Nottingham allowed the money in the trustee's account, saying, "he was to keep it but as his own."^(f) And this doctrine is confirmed by *Jones v. Lewis*, where a decree had been obtained against the defendant's husband (to whom she was administratrix) for a general account of assets, and for payment of the balance. The defendant excepted to the report; for that certain goods, which had been delivered by her to her solicitor, and offered to the plaintiff, had been since stolen from her solicitor. And Lord Hardwicke allowed this exception. "I will now," said his Lordship, "consider this case as if the robbery had been without any tender of the goods at all to the plaintiff. It is certain, that if bailee of goods, against whom there is an action of account at law, loses the goods by robbery, that is a discharge in an action of account at law: and it is proved, (and, I think, reasonably,) that if a trustee is robbed, that robbery properly proved shall be a discharge, provided he keeps them so as *he would keep his [*499] own. So it is as to an executor or administrator, who is not to be charged further than goods come to his hands; and for these not to be charged unless guilty of a devastavit; and if robbed, and he could not avoid it, he is not to be charged, at least in this Court. How it would be at law, I know not; for I know no case of that at law. The defendant is administratrix: supposing these goods had been in her own custody, and she had been robbed, I am clear of opinion, if that fact be made out, (which can only be by circumstances, as it is probably made out here,) she ought to have been discharged of these goods; and that notwithstanding no tender thereof, for that was a superabundant act; for it is a decree against her husband, not for delivery of the goods, but for a general account of assets, and nothing directed to be paid but what was found on the balance. The only doubt then is, that they were not lost out of her custody, but her solicitor's, where they were put by her for a particular purpose. I do not know that a bailee, executor, administrator, or trustee, are bound to keep goods always in their own hands. They are to keep them as their own, and take the same care. If, therefore, a man lodged trust money with a banker; if lost, in many cases, the Court has discharged the trustee, especially if lost out of the banker's hands by robbery. In the present case, what has been done is, what she would have done with her own—leaving them with her solicitor in order to be delivered to plaintiff, when proper so to do; and why might she not do that? It is the same as if they had been in her own custody; and there is no pretence that they were collusively put into the hands of her solicitor. It would be too hard to charge her with these things lost."^(g)

When there are two or more executors named in a will, and they all, or two or more only, accept the executorship; for many purposes, each executor so undertaking the office represents the person of the testator, and is wholly independent of the rest.^(h) Each is able to receive a

(e) *Bacon v. Bacon*, 5 Ves. 331; *Chambers v. Minchin*, 7 Ves. 193. See *Pistor v. Dunbar*, 1 Anstr. 107.

(f) 2 Ch. Cas. 2.

(g) 2 Ves. 240.

(h) 2 Ves. 267; 1 Eden, 359; 1 Dick. 357.

debt due to the testator, and alone, and without the signature of another [*500] executor, to give a sufficient *receipt for the money.(i) Each also possesses the power to make disbursements, as in payment of the testator's debts.(j) And each, without the concurrence of another executor, is able to sell a personal chattel,(k) or leasehold for years, belonging to the testator; and in either case to sign a sufficient receipt for the purchase money; and, in the instance of the leasehold for years, to execute a valid conveyance or assignment of it.(l) As, therefore, each executor is for many purposes independent of the rest, reason points out, and, it is accordingly acknowledged and decided, that when an executor exercises his independent power over the estate of the testator, although this executor may be personally responsible for the effect of the act done, as a loss or injury occasioned by it to the testator's estate,(m) yet a co-executor, who did not concur in the act, is not answerable with him.(n)

In the event of the death of an executor, by whom a devastavit is committed, it appears that at law the waste was formerly considered to be a personal wrong, which died with the executor.(o) This state of the law has however been altered by the legislature.(p) And the statute 4 and 5 W. & M., c. 24, s. 12, enacts, that the executor of an executor, who shall waste the estate of his testator, shall be liable and chargeable in the same manner as his testator should or might have been. In equity, the waste constitutes a simple contract debt, payable out of the personal assets of him, by whom it is committed.(q) A debt created by a devastavit was, in *Price v. Morgan*, held not to be such a debt as [*501] was *within the meaning of the particular will, by which lands were devised to be sold to pay the debts of the testator.(r)

In particular cases, an executor who commits a devastavit in law may be relieved in equity.(s) And at law relief has been afforded to an administratrix, by setting aside a judgment confessed by her; a simple contract creditor having taken advantage of her want of knowledge of the law, and prevailed on her, who had notice of a bond debt, to confess judgment to creditors by simple contract.(t)

(i) 4 Durn. & E. 632; 2 Ves. 267; 7 Ves. 198; *Westley v. Clarke*, 1 Eden, 357.

(j) 2 Ves. 267, 268.

(k) Bro. Abr. tit. Executors, 66; 4 Durn. & E. 632; 2 Ves. 267.

(l) Anon. 1 Dyer, 23 b., Ca. 146; *Pannel v. Fenn*, Cro. Eliz. 347, 1 Rol. Abr. 924; *Westley v. Clarke*, 1 Eden, 357.

(m) *Langford v. Gascoyne*, 11 Ves. 333.

(n) *Hardr.* 314; Toth. ed. 1820, p. 88; 1 Dick. 357; 2 Bro. C. C. 116; 4 Ves. 607; *Darwell v. Darwell*, 2 Eq. Cas. Abr. 456; *Langford v. Gascoyne*, 11 Ves. 336, as to the executor Lambert.

(o) *Tucke's case*, 3 Leon. 241; *Brown v.*

Collins, 2 Lev. 110; *Astry v. Nevit*, ib. 133; Anon., 1 Vent. 292.—1 Ch. Cas. 303; 2 Ch. Cas. 217;

(p) Stat. 30 Ch. II. c. 7; 4 and 5 W. & M. c. 24, s. 12.

(q) *Bathurst's case*, 2 Vent. 40; *Price v. Morgan*, 2 Ch. Cas. 215; *Charlton v. Low*, 3 P. W. 330, 331; *Townsend v. Barber*, 1 Dick. 356.

(r) 2 Ch. Cas. 215.

(s) *Executors of Lady Croft v. Lyndsey*, 2 Freem. 1. See 7 East, 258, and *Holt v. Holt*, 1 Ch. Cas. 190.

(t) Anon., 2 Kenyon, part 1, p. 294.

SECTION II.

OF AN IRREGULAR PREFERENCE OF A CREDITOR.

It appears that, by the decision of, or opinion expressed in, a Court of Law, at law a devastavit may be committed, or the executor's personal liability or loss incurred,—by paying a debt of a lower before one of a higher degree; (*u*) as a bond or simple contract debt before a debt by judgment obtained against the executor, (*v*) or a simple contract debt before a debt by bond, (*w*) of which the executor has notice: (*x*) by first paying the latter of two judgments obtained against the executor: (*y*) by paying a bond debt, after notice of an action brought against the executor by another bond creditor: (*z*) by paying a bond debt, the day of payment of which is not yet come, before a bond debt, the day of payment of which is past: (*a*) by confessing judgment to a simple contract *creditor, after notice of a debt by bond: (*b*) by [*502] paying a simple contract creditor, after another in equal degree has sued an original. (*c*)

And by a Court of Equity it is held, that in equity a devastavit may be committed, by paying a debt of a lower before one of a higher degree, (*d*) as a bond debt before a debt by final decree obtained against the executor. (*e*)

To charge an executor with a devastavit, on account of payment of debts by simple contract before a debt by bond, some notice of the bond debt must in equity, (*f*) as well as at law, be proved. (*g*) But of debts of record an executor is bound to take notice. (*h*) And therefore if before a debt of record, as a Crown debt, (*i*) or judgment (*j*) docketed pursuant to the statute 4 and 5 W. & M., c. 20, (*k*) or final decree in equity, (*l*) he out of legal assets pays a debt by bond or simple contract, he is guilty of a devastavit, (*m*) notwithstanding this payment was made without notice of the debt of record. (*n*) At law, to a *scire facias*

(*u*) *Bearblock v. Read*, 2 Brownl. & G. 81. See 6 Modd. 144.

(*v*) *Vaugh.* 94, 95. See also 2 Salk. 507.

(*w*) *Doct. & St. Dial.* 2, ch. 10, ed. 1709, p. 158; *Bro. Abr. tit. Administrators*, pl. 50; *Vaugh.* 94.

(*x*) *Vaugh.* 94; *Fitzg.* 78; 3 *Lev.* 115; 1 *Mod.* 175; 3 *Mod.* 115; *Amb. ed. Blunt*, *Append.* 803; 1 *Dick.* 157.

(*y*) *Vaugh.* 95; *Bro. Abr. tit. Executors*, pl. 103; 1 *Rol. Abr.* 927, T. pl. 1.

(*z*) *Scarle's case*, Mo. 678; *Anon. Keilw.* 74 a., Ca. 20.

(*a*) *Bro. Abr. tit. Executors*, pl. 172; 1 *Rol. Abr.* 926, Q. pl. 5.

(*b*) *Anon.* 2 *Kenyon*, part 1, p. 294. See *Vaugh.* 95, and *Sawyer v. Mercer*, 1 *Durn. & E.* 690.

(*c*) 2 *Kenyon*, part 1, p. 294, 295.

(*d*) *Chapman v. Derby*, 2 *Vern.* 117.

(*e*) *Mason v. Williams*, 2 *Salk.* 507.

(*f*) *Hawkins v. Day*, *Amb.* 160, 1 *Dick.* 155.

(*g*) *Vaugh.* 94; *Fitzg.* 78; 3 *Lev.* 115; 1 *Mod.* 175; 3 *Mod.* 115; *Amb. ed. Blunt*, *Append.* 803; 1 *Dick.* 157. See 1 *Barnard. Rep.* 186.

(*h*) *Cro. Eliz.* 793; 2 *Vern.* 89; 2 *Freem.* 104; 3 *P. W.* 117; 1 *Barnard. Rep.* 186; 4 *Barn. & C.* 416, n.; *Anon.* 1 *Dyer*, 32 a. n.

(*i*) *Cro. Eliz.* 575; 1 *Rol. Abr.* 927, S. pl. 5; 16 *East*, 281; 4 *Barn. & C.* 416, n. See also *Bro. Abr. tit. Executors*, pl. 116.

(*j*) *Ordway v. Godfrey*, *Cro. Eliz.* 575; *Littleton v. Hibbins*, *ib.* 793.—3 *P. W.* 117.

(*k*) *Hickey v. Hayter*, 1 *Espin.* 313, 6 *Durn. & E.* 384; *Steele v. Rorke*, 1 *Boe. & P.* 307.

(*l*) *Shafto v. Powell*, 3 *Lev.* 355; *Mason v. Williams*, 2 *Salk.* 507; *Searle v. Lane*, 2 *Vern.* 37, 88, 2 *Freem.* 103; *Bishop v. Godfrey*, *Proc. Ch.* 179.

(*m*) *Otway v. Ramsay*, 4 *Barn. & C.* 416, 417, n.

(*n*) 2 *Vern.* 37, 89.

against executors upon a judgment against their testator in debt, it is not any plea to plead, that, before they had any conusance of this judgment, they had fully administered in paying debts on obligations.(o) Also at law, to a *scire facias* on a decree in the Exchequer, a plea of payment [*503] of a bond is not any bar.(p) *And, in equity, if an executor pays a bond debt before a debt by final decree, the Court will not allow that payment in his account.(q)

SECTION III.

OF ACCEPTING SECURITY, IN PLACE OF PAYMENT OF A DEBT.

If, in the place of payment of a debt due to a testator, his executor accepts a security from the debtor to himself for payment of it, in many cases this act of the executor makes the debt present assets in his hands, although, under such new security, the money is not payable to him until a future day.(r) The security so taken by the executor may be an agreement by articles,(s) or a promissory note,(t) or a bond.(u) And by reason of such constructive present assets in the hands of the executor, he is, before he has received the money secured to him, personally liable to satisfy, to the extent of such assets, the creditors of the testator; and they may avail themselves of this liability by either action at law,(v) or, it is presumed, suit in equity,(w) against him. And it is further to be mentioned, that if an executor sells goods of the testator, and, instead of present payment of the purchase money, he takes from the purchaser a security to pay it, it seems the money so secured is present assets, and, to their extent, the executor is, before receipt of the money, personally liable at law to satisfy the demands of the testator's creditors.(x)

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*SECTION IV.

OF AN EXECUTOR'S PROMISE TO PAY A DEBT.

An executor may make himself liable to pay, out of his own pocket, a debt due from his testator, if in certain cases he promises to pay the debt. But to incur this personal responsibility, the agreement, or some memorandum or note of it, must be in writing. For the Statute of Frauds, 29 Ch. II., c. 3, enacts by section 4, that "no action shall be

- (o) Littleton v. Hibbins, Cro. Eliz. 793.
 (p) Shafto v. Powel, 3 Lev. 355.
 (q) Bishop v. Godfrey, Prec. Ch. 179.
 (r) 2 Lev. 190; 2 Freem. 100; Cas. T. Holt 297; 12 Mod. 346.
 (s) Norden v. Levit, 2 Lev. 189. See Goring v. Goring, Yelv. 10.
 (t) Barker v. Talcot, 1 Vern. 473.
 (u) Anon. Cas. T. Holt, 297, 12 Mod. 346.
 (v) Norden v. Levit, or Leven, 2 Lev. 189; Anon., adjudged by Pemberton, C. J., cited 1 Vern. 474; Anon. Cas. T. Holt, 297, 12 Mod. 346.
 (w) Barker v. Talcot, 1 Vern. 473; Anon., S. C., 2 Freem. 100; Hilliard v. Gorge, 2 Ch. Cas. 235. See Armitage v. Metcalf, 1 Ch. Cas. 74; which, it is observable, was not the suit of a creditor.
 (x) Norden v. Levit, or Leven, 2 Lev. 189, T. Jones, 88, 1 Freem. 442; cited 1 Vern. 474, and 2 Freem. 100.

brought, whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Under this enactment, not only the promise itself,^(y) but the consideration of it, must be set down or appear in writing.^(z)

Although an executor promises to pay a debt of his testator, yet if the creditor brings an action, not against him personally on his promise, but against him as executor, and to recover the demand out of the testator's effects, by this action the debt cannot be recovered except out of assets, and the executor is not personally liable to pay it.^(a) If the action is brought against the executor personally, on his promise, then such promise must be supported by a sufficient consideration; otherwise an action of assumpsit cannot be maintained on it against the executor.^(b) *The consideration necessarily depends on the particular circumstances of each case, and accordingly found to be of various kinds, in instances where an executor or administrator has, by his promise, made himself personally liable to pay the debt of his testator or intestate;^(c) as where the promise was made in consideration that the creditor, or plaintiff, would deliver to the defendant, an administratrix, a certain quantity of goods,^(d) or that the creditor had, at the request of the executor, accounted with him.^(e)

Two kinds of consideration, the one, possession of assets, the other, forbearance to sue, claim particular notice. If an executor promises to pay a debt of his testator, and, at the time of his promise, he has in his hands assets sufficient for the purpose, and there is no other consideration for the promise, such assets constitute a consideration, that is able to sustain it. And, accordingly, an action of assumpsit lies on such promise against the executor personally; and the judgment against him is *de bonis propriis*, by which he becomes personally liable to pay the debt.^(f) But if the executor does not at the time of the promise possess assets, then, if there is no other consideration, an action cannot be supported on such promise.^(g)

Many authorities establish, that a forbearance to sue is a sufficient con-

(y) *Grindall v. Davies*, 1 Freem. 532. See also *Philpot v. Briant*, 4 Bing. 717, 721.

(z) *Wain v. Warlters*, 5 East, 10; *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Jenkins v. Reynolds*, 3 Brod. and B. 14; *Russell v. Moseley*, ib. 211.

(a) *Pearson v. Henry*, 5 Durn. and E. 6, 8.

(b) *Kitchinman v. Bishop of Ossory*, 1 Rol. Abr. 24; *Forth v. Stanton*, 1 Saund. 210, 1 Lev. 262; *Day v. Cawdrey*, 1 Freem. 434; *Day v. Garely*, 3 Keb. 710; *Reech v. Kennegal*, 1 Ves. 126; *Rann v. Hughes*, 7 Durn. and E. 350, n.; *Saunders v. Wakefield*, 4 Barn. and Ald. 600.

(c) *Moore v. Bray*, 1 Rol. Abr. 24.

(d) *Wheeler v. Collier*, Cro. Eliz. 406, Mo. 419.

(e) *Hawes v. Smith*, 2 Lev. 122; *Anon.* S. C., 1 Ventr. 268. See *Secar v. Atkinson*, 1 H. Bl. 102; where also *Hawes v. Smith* is cited.

(f) *Trewinian v. Howell*, Cro. Eliz. 91, cited Cowp. 293; *Beecher v. Mountjoy*, stated 9 Co. 90, 1 Rol. Abr. 930, C. pl. 1; *Hodgson v. Maynard*, 3 Leon. 67, 4 Leon. 5; *Reech v. Kennegal*, 1 Ves. 126. See *Kitchinman v. Bishop of Ossory*, 1 Rol. Abr. 24, and *Bigg v. Malin*, Hutt. 28.

(g) *Trewinian v. Howell*, Cro. Eliz. 91; *Bigg v. Malin*, Hutt. 28; *Browne's case*, 1 Freem. 309; *Mercer v. Brown*, 3 Keb. 514; *Hodgson v. Maynard*, 3 Leon. 67, 4 Leon. 5; *Rann v. Hughes*, 7 Durn. & E. 350, n. See also 5 Durn. & E. 8.

sideration to sustain an executor's promise to pay a debt of his testator.(h)

[*506] "When an executor is applied to for payment of a debt due from his testator, and, on the creditor's agreeing to forbear for a definite time, as until a certain day, to bring an action at law against the executor for it, the executor promises payment, and when this promise is made, the executor has in his hands assets sufficient to pay the debt, such forbearance to sue and possession of assets constitute a sufficient consideration to support the executor's promise, and on it an action of assumpsit lies against the executor and the judgment against him is general, or *de bonis propriis*.(i) In the declaration it is not necessary to aver assets; the promise to pay implies them.(j) And, contrary to an opinion of Sir E. Coke,(k) it is yet farther decided, and is now fully established, that the creditor's forbearance to sue is by itself, and without possession of assets at the time of the promise, sufficient consideration to support that promise.(l)

A consideration of forbearance is good, when the time it is to endure is definite or certain.(m) It is likewise sufficient, although the creditor is to forbear generally, no time being mentioned,(n) a perpetual or absolute forbearance being perhaps then in law intended;(o) or if the creditor is to forbear for a reasonable time, "*per rationabile tempus*."(p) But it seems that if he is to forbear for a short or a little time, "*per paululum* **tempus*,"(q) or for some time, "*pro aliquo tempore*,"(r) such forbearance is not a sufficient consideration to support the executor's promise.

As forbearance to sue at law is a sufficient consideration to sustain an action of assumpsit, on an executor's promise of payment, so likewise, it would seem, is forbearance to sue the executor in equity.(s)

An executor may, it appears, confine his promise to pay, to payment

(h) Treford v. Holmes, Hutt. 108; Gardener v. Fenner, 1 Rol. Abr. 15; Walker v. Wittall, ib. 28; Russell v. Haddock, 1 Lev. 188; Johnson v. Gardiner, 10 Mod. 254; Frederick v. Wynne, 11 Vin. Abr. 428, 2 Eq. Cas. Abr. 456; Resch v. Kennegal, 1 Ves. 126; Rann v. Hughes, 7 Durn. & E. 350, n.

(i) Banes' case, or Baines v. Paine, 9 Co. 93 b., Jenk. Cent. C. 7, Ca. 27; Bond v. Payne, 8 C., Cro. Jac. 273; Fisher, or Fish, v. Richardson, ib. 47, Yelv. 55.

(j) Linghill, or Linghen, v. Broughton, Mo. 853, 1 Rol. Abr. 26; Banes' case, 9 Co. 94, 1 Rol. Abr. 921, l. pl. 3; Davies v. Warner, Cro. Jac. 593; Bothe v. Crampton, ib. 613; Porter v. Bille, 1 Freem. 125. See Bard v. Bard, Cro. Jac. 602, and Evans, v. Warren, ib. 604.

(k) 9 Co. 94; 2 Rol. Abr. 684, pl. 5. See Lord Graye's case, 1 Rol. Abr. 28, pl. 57.

(l) 2 Rol. Abr. 684, pl. 5, Johnson v. Whitchcott, 1 Rol. Abr. 24; Davis v. Wright, or Reynier, 1 Vent. 120, 2 Lev. 3; Smith's case, Clayt. 85. See also Yelv. 11.

(m) Banes' case, 9 Co. 93 b.; Chambers

v. Liversedge, Cro. Eliz. 644; Tisdale's case, ib. 758.

(n) May v. Alvares, Cro. Eliz. 387; Mapes v. Sidney, Cro. Jac. 683. See Sackford v. Phillips, or Phillips v. Sackford, 1 Rol. Abr. 27, Cro. Eliz. 455; Mature v. West, Cro. Eliz. 665, and Therne v. Fuller, Cro. Jac. 397.

(o) 1 Rol. Abr. 27, pl. 45; Cro. Jac. 684.

(p) Linghill, or Linghen, v. Broughton, Mo. 853, 1 Rol. Abr. 26; Johnson v. Whitchcott, 1 Rol. Abr. 24.

(q) Mo. 854; Cro. Eliz. 759; Cro. Car. 438; 1 Rol. Abr. 23, pl. 26; Lutwich v. Hussey, Cro. Eliz. 19; Brian v. Salter, 1 Rol. Abr. 23; which authorities seem to contradict Cooks v. Douze, Cro. Car. 241, and Scovell v. Covell, 1 Rol. Abr. 27, pl. 46, 47. See also Gill v. Harewood, 1 Leon. 61, and Tolhurst v. Brickenden, Cro. Jac. 250.

(r) Tolson v. Clerk, Cro. Car. 438; Tilston v. Clark, 8 C., 1 Rol. Abr. 23.

(s) Dowdenay v. Oland, Cro. Eliz. 768; Coulston, or Colston, v. Carr, ib. 848, 1 Rol. Abr. 26; Pooley v. Gilbert, 1 Rol. Abr. 19.

out of assets.(t) And then such promise does not make the executor personally responsible; as if the promise is expressed in the words, "Stay awhile until the testator's estate is come in, and I will pay you;"(u) or the promise is to pay the debt, "so soon as any debt due to the testator comes to his, the executor's hands, to the value of the debt."(v) And it would seem that, in these cases, the executor is not personally responsible, although there exists a consideration, as possession of assets, that would be sufficient to support a promise of payment generally.(w) In *Childs v. Monins*, executors made a promissory note in the words—"As executors to the late T. T. we severally and jointly promise to pay to Mr. N. C. the sum of 200*l.* on demand, together with lawful interest for the same. J. M., P. B., executors;" and this promise was held not to be limited to payment out of the testator's estate, but to make the executors personally answerable for the debt; and on the grounds, it would seem, that the words "on demand" admitted assets; and the engagement to pay interest imported payment at a future day, and compensation for forbearance to sue.(x)

*An executor, who, under a promise to pay a debt of his testator, has out of his own property satisfied it, is entitled [*508] to repayment out of assets that may come into his hands.(y)

It may in this place be mentioned, that, for a legacy given out of personal property, an executor may be sued in either a Court of Equity, or the Ecclesiastical Court.(z) Some doubt, however, exists on the subject of an action in a Court of Law, to recover a general or pecuniary legacy, payable out of personal estate.(a) *Farish v. Wilson*, which was tried at *Nisi Prius*, was assumpsit for money had and received, and brought to recover a sum of bank stock, being a legacy left to the plaintiff's wife. The defendant was the agent of the plaintiff, and had, as stated by the plaintiff, received the money; but the latter, not proving the case stated, was nonsuited. And Lord Kenyon, before whom the cause was tried, said—"Had this action been against the trustee or executor, I am clearly of opinion it could not be maintained. It is highly convenient and beneficial, that Courts of Equity should have the sole jurisdiction in these cases. Those Courts make provision for children, infants, married women, &c., according to the situation of the parties, and circumstances of the case; whereas a Court of Law can only proceed according to the strict rules of law, without at all consulting the convenience of the parties. This is not the present case: I only took this opportunity of delivering my opinion, lest it should be thought that I was of opinion, that in any case an action at law would lie for a legacy."(b) This opinion, which Lord Kenyon thus took occasion to express at *Nisi Prius*, is, to at least a certain extent, confirmed by his Lord-

(t) 2 Brod. & B. 462, 463; *Dowse v. Cox*, 3 Bing. 20.

(u) *Anon.* 1 Ventr. 268.

(v) *Kitchinman v. Bishop of Ossory*, 1 Rol. Abr. 24.

(w) 1 Ventr. 268; 1 Rol. Abr. 24, pl. 32.

(x) 2 Brod. & B. 460, 5 J. B. Moore, 282.

(y) 9 Co. 94; *Frederick v. Wynne*, 11 Vin. Abr. 428, 2 Eq. Cas. Abr. 466.

(z) Cowp. 287, 288, 289, 292; 5 Durn. & E. 692, 693; 3 Atk. 346. See also *Aleyn*, 40.

(a) On an action for a legacy charged on land, see 6 Mod. 26, 3 Ld. Raym. 937, 3 Salk. 415, Cas. T. Holt, 419, 4 M. & Sel. 119.

(b) 1 Peake, Rep. 73, 3rd ed. 103.

ship and the other judges of the Court of King's Bench, who decided a case that occurred about three years after *Farish v. Wilson*. The case referred to is *Deeks v. Strutt*, where the executor did not expressly promise payment of a general legacy, as distinguished from one that is specific, and it was decided, a Court of Law would not *raise an implied promise to pay, and the legatee could not at law recover the legacy.(c) In a recent case, where there was not, grounded on a consideration, a promise to pay a distributive share of an intestate's property, it was held that such share could not be recovered in a Court of Law.(d) In *Gregory v. Harman*, the defendants who were executors, after payment of debts and legacies rendered an account of the residue of the testator's personal estate to the four residuary legatees; three of whom received from them their several proportions; and they all executed a general release to the defendants, as executors. The plaintiff, the remaining residuary legatee, at the request of the executors, lent to them his share, and permitted them to retain it. This share, it was decided, the plaintiff might afterwards recover by action at law; and on the grounds, that after the account rendered, and the payment to the three other legatees, and the general release, and the loan to the defendants, the money so lent was not held by the defendants as executors, but by way of loan.(e),

If an executor promises to pay a general legacy, given out of personal estate, and this promise is sustained by a sufficient consideration, then, according to certain decisions, the legacy may be recovered at law by an action of assumpsit against the executor personally on his promise; and the judgment against him is *de bonis propriis*.(f) a judgment that subjects him to pay the legacy out of his own pocket. According, also, to decided cases, a consideration that will support the promise may be, the possession at the time of the promise of sufficient assets to satisfy the legacy;(g) *or it may be, forbearance to sue the executor;(h) and, in the latter instance, it is not necessary to aver assets at the time of the promise;(i) forbearance to sue will sustain the action, although at the time of the promise, the executor had not assets in his hands.(j)

It is, however, to be recollected, that the forbearance of suit intended in the cases cited seems to be, forbearance to sue in a Court of Law; and that those cases occurred before the decision made in *Deeks v. Strutt*, where the executor had not promised payment of the particular legacy, and it was held an action did not lie against him in a Court of Law for it. Since this case, a forbearance to sue, to be a sufficient consideration

(c) *Deeks v. Strutt*, 5 Durn. & E. 690, cited 8 Durn. & E. 593, 3 East, 123, 124, 126, 7 Barn. & C. 544, 4 J. B. Moore, 540, and 1 Moore & P. 215. See also 2 Ves. jun. 676, and 5 Ves. 516, 517.

(d) *Jones v. Tanner*, 7 Barn. & C. 542, 1 Man. & Ryl. 420.

(e) 1 Moore & P. 209, 3 Car. & P. 205.

(f) *Bothe v. Crampton*, Cro. Jac. 613; *Davis v. Wright*, 1 Vent. 120; *Davis v. Reyner*, S. C., 2 Lev. 3, 2 Keb. 744, 758; *Atkins v. Hill*, Cowp. 284; *Hawkes v.*

Saunders, ib. 289, cited 8 Durn. & E. 593. See *Bard v. Bard*, Cro. Jac. 602. And on an executor's bond for payment of a legacy, see *Goodwyn v. Goodwyn*, Yelv. 39.

(g) *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, ibid. 289.

(h) *Bothe v. Crampton*, Cro. Jac. 613; *Davis v. Wright*, or *Reyner*, 1 Vent. 120, 2 Lev. 3.

(i) *Bothe v. Crampton*, Cro. Jac. 613.

(j) *Davis v. Wright*, or *Reyner*, 1 Vent. 120, 2 Lev. 3.

for a promise of payment of a legacy, must, perhaps, refer to a suit in a Court of Equity or in the Ecclesiastical Court.

Although in the cases mentioned it is clearly decided, and in *Atkins v. Hill* and *Hawkes v. Saunders*, Lord Mansfield and Mr. Justice Buller expressed in forcible language their approbation of the doctrine, that if an executor promises to pay a general legacy, and this promise is grounded on a sufficient consideration, an action lies against him in a Court of Law for it, yet it cannot, it is considered, be taken to be free from all doubt, that such is the state of the law at the present day. For in *Jones v. Tanner*, where counsel, after citing *Atkins v. Hill* and *Hawkes v. Saunders*, distinguished from them the case of *Deeks v. Strutt*, decided by Lord Kenyon, and Ashhurst, J., and Grose, J., "for there the executor had not made an express promise to pay, which circumstance was particularly noticed by Grose, J.;" Mr. Justice Littledale interposed this important observation,—“The judgment of Lord Kenyon, C. J., did not proceed upon that distinction, and has always been considered as an unqualified decision, that an action at law cannot be maintained for a legacy.”^(k) And in *Knights v. Quarles*, Mr. Justice Burrough took occasion to *observe,—“In *Atkins v. Hill* it was held that assumpsit lay upon a promise by an executor to pay a legacy [*511] in consideration of assets, as such promise was grounded on a good and sufficient consideration, viz. that the defendant had assets to discharge the legacy. But in *Deeks v. Strutt* it was decided, that legacies were not recoverable at law, but only in equity.”^(l) There may, nevertheless, be some room for doubt, if Lord Kenyon meant in *Deeks v. Strutt* to overrule *Atkins v. Hill* and *Hawkes v. Saunders*, and the like cases, on an express promise; or, indeed, if he did so mean, whether *Deeks v. Strutt* does in fact overrule them; and it is certain that many years after *Deeks v. Strutt*, the Court of King's Bench considered that that case turned on the circumstance, that there was not there an express promise to pay the legacy. For in *Doe v. Guy*, where it was decided, that, after the executor has assented to the bequest, an action at law lies against him to recover a chattel, personal or real, specifically bequeathed,^(m) Lord Ellenborough stated that the question before the Court in *Deeks v. Strutt* was, “whether the law would raise an implied promise on proof of an acknowledgment of assets by the executor, so as to sustain an action against him.” And in the same case, Grose, J. (who, it may be remarked, was one of the Court by whom *Deeks v. Strutt* was decided,) said, “The only question in the case of *Deeks v. Strutt* was, whether the law would raise an implied assumpsit to pay the annuity, upon proof of the executor's acknowledgment of assets. I thought it would not.” And Le Blanc, J., observed, that it formed a ground of objection with the judges to the action in *Deeks v. Strutt*, “that it was a novel attempt to contend that the law would raise an implied assumpsit against an executor, merely from the possession of assets.” And a similar observation was made by Mr. Justice Lawrence.⁽ⁿ⁾ It is material farther to mention that *Gorton v. Dyson*, decided many years after *Deeks v. Strutt*, and comparatively a late determination, appears to be an authority, that if, where

(k) 7 Barn. & C. 544.

(l) 4 J. B. Moore, 540.

(m) 4 Espin. 154, 3 East, 120; cited 9 Barn. & C. 160.

(n) 3 East, 123—127.

[*512] there is a bequest of a sum of money, the executor *acknowledges that the money constitutes a debt or sum in which he stands indebted to the legatee, as and for the legacy bequeathed, an action at law lies against the executor for money had and received by him to the use of the legatee.(o) And in a recent case, Mr. Justice Gazelee observed on *Deeks v. Strutt*, that Lord Kenyon there “merely expressed himself as to the general policy of the law; but if it were a general principle that no action could in any event be maintained for a legacy, many subsequent decisions could not be supported.”(p)

SECTION V.

OF AN EXECUTOR'S LIABILITY FOR INTEREST.

A DECREE in equity may often be obtained against a trustee, or trustee in whom is united the character of executor also, to pay out of his own property interest on money or balances in his hands, or on money which he is decreed to pay;(q) as “if a trustee empowered to put money to interest let the money lie by him;”(r) and as in the instances,—where by an order made by consent, a trustee was ordered by the Court of Chancery to pay a certain sum into Court, but he never complied with that order;(s) where a testator directed his estate to be laid out, and the interest, and after certain time the principal, to be paid to certain persons in the will mentioned; and the executor, instead of laying out the balances, kept them in his hands;(t) where the *money of [*513] the testator was well placed out upon good securities, and unnecessarily called in by an executor, on pretence to pay debts, but otherwise converted;(u) where an executor committed a breach of trust, by not calling in a debt which was bequeathed, and the executor was obliged to pay this legacy out of his own pocket;(v) where a trustee lent money on a promissory note, and the borrower having become a bankrupt, the trustee was decreed to be personally liable to make good the loss.(w)

In other cases also an executor may be compelled to pay, out of his own property, interest;(x) as if “money placed out at interest is called

(o) 1 Brod. & Bing. 219.

(p) *Gregory v. Harman*, 1 Moore & P. 215.

(q) *Parrot v. Treby*, Prec. Ch. 245; *Dawson v. Parrot*, 3 Bro. C. C. 236; *Younge v. Combe*, 4 Ves. 101; *Longmore v. Broom*, 7 Ves. 124, 129; *Ashburnham v. Thompson*, 13 Ves. 402, cited 1 Madd. Rep. 303; *Underwood v. Stevens*, 1 Mer. 712; *Tebbs v. Carpenter*, 1 Madd. 290; *Bone v. Cook*, McClel. 168, 178, 13 Price, 332. On Interest, see, farther, *Earl of Lincoln v. Allen*, 4 Bro. P. C. ed. Toml. 553; *Treves v. Townshend*, 1 Bro. C. C. 384, 1 Cox, 50; *Foster v. Foster*, 2 Bro. C. C. 616; *Browne v. Southouse*, 3 Bro. C. C. 107; *Hankey v. Garret*, 1 Ves. jun. 236, 3 Bro. C. C. 457;

Ex parte Strutt, 1 Cox, 439; *Bruere v. Pemberton*, 12 Ves. 386; *Pearse v. Green*, 1 Jac. & W. 135.—1 Ves. jun. 452.

(r) 10 Mod. 31.

(s) *Sammes v. Rickman*, 2 Ves. jun. 36.

(t) *Rocke v. Hart*, 11 Ves. 58, and stated from Reg. B. 1 Madd. Rep. 305.

(u) *Haslewood v. Baldwin*, Cas. T. Finch, 457.

(v) *Mucklow v. Fuller*, Jacob, 198, 200.

(w) *Ryder v. Bickerton*, 3 Swanst. 80, n.

(x) *Ratcliffe v. Graves*, 1 Vern. 196, 3 Ch. Cas. 152; *Goodere, or Goodyere, v. Lake*, 1 West Cas. T. Hardw. 490, Amb. 584; *Hall v. Hallet*, 1 Cox, 134; *Seers v. Hind*, 1 Ves. jun. 294; *Langford v. Gascoyne*, 11 Ves. 333, 337; *Turner v. Turner*, 1 Jac. & W.

in by the executor without any cause;"(y) and in the instances,—where executors lent money on bond, and the security failed by the obligor's becoming insolvent, and the executors were in consequence personally obliged to make good the money lent:(z) where executors had, without a cause, kept money for some years in their hands:(a) where executors had kept money for many years in their hands, and longer than it was necessary to keep the money to answer the exigencies of the testator's affairs:(b) where an executor had kept money a long time in his hands, and applied it in the course of his trade;(c) where an administrator had kept money for four or five years in his hands, and had mixed it with his own money, and from time to time had laid out the mixed fund in government securities:(d) where an executor had for many years received the dividends of stock, and from time to time paid the same, with other monies, *into the hands of his bankers, and had ne- [*514] glected to accumulate them by investment.(e)

The rate, at which, in the instances mentioned, and in similar cases, interest is obliged to be paid, is in ordinary cases 4*l.* per cent.; and when payable by either a trustee,(f) or executor.(g) But, in particular cases, 5*l.* per cent. interest is decreed against a trustee, or executor;(h) as where a trustee or executor, or one who sustains both these characters, sells out stock, and the person beneficially entitled to the property, who may elect to have the stock replaced, or to claim the money for which it was sold, with interest, elects to take such produce of the sale;(i) and in the instances,—where a testator gave all his personal estate to a person, whom he appointed his executor, upon trust to place the same out in the public funds, or on mortgage, or other sufficient security, and to pay the dividends and interest to certain persons for their lives; and, instead of following the directions of the will, the executor called in part of the property, that was out upon security, and used the property generally in his trade, and in various transactions in the public funds, paying only the dividends of the stock to the persons entitled under the will for life, and lent part of the property to his son upon the same terms:(j) where an executor in trust for infants called nearly the whole of the testator's property from securities, as to the validity of which there was no imputation; and upon which it was producing interest, generally speaking 5*l.* per cent.; calling it in, not only for no purpose connected with the execution of the will, but for no other purpose than that of keeping the

39, 43; *Spode v. Smith*, 3 Russ. 511; *Stewart v. Lord Blaney*, 2 Ridgew. P. C. 204. See also 1 Ball & B. 231.

(y) *Taylor v. Gerst*, Mos. 99. See 1 Bro. C. C. 361.

(z) *Holmes v. Dring*, 2 Cox, 1.

(a) *Franklin v. Frith*, 3 Bro. C. C. 433.

(b) *Littlehales v. Gascoyne*, 3 Bro. C. C. 73.

(c) *Newton v. Bennet*, 1 Bro. C. C. 359, cited 1 Mad. Rep. 304.

(d) *Perkins v. Bayntun*, 1 Bro. C. C. 375.

(e) *Goodchild v. Fenton*, 3 Y. & Jerv. 481.

(f) 4 Ves. 104; 11 Ves. 582; 1 Mer. 717.

(g) 1 Cox, 138; 2 Cox, 2; 1 Bro. C. C. 375; 11 Ves. 582; 1 Madd. 306; 1 Russ. 151; *Rocke v. Hart*, 11 Ves. 58, cited 1 Madd. 305.

(h) *Bird v. Lockey*, 2 Vern. 743; *Dornford v. Dornford*, 12 Ves. 127, and stated from Reg. B. 1 Madd. 301; *Bate v. Scales*, 12 Ves. 402; *Heathcote v. Hulme*, 1 Jac. & W. 122, 134, 135; *Brown v. Sansome*, M'Clel. & Y. 427; *Attorney General v. Solly*, 2 Sim. 518. See also *Rocke v. Hart*, 11 Ves. 58.

(i) *Poole v. Reddington*, 5 Ves. 794; *Long v. Stewart*, ib. 800, n. See also *Bate v. Scales*, 12 Ves. 402.

(j) *Piety v. Stace*, 4 Ves. 620.

money in his own hands, and treating it as part of his own general funds:(*k*) where a person *by his will directed his executor [*515] to invest his personal property in the public funds, upon certain trusts for the benefit of the testator's wife and children; and the executor, instead of doing this, unnecessarily first sold out a part, and afterwards the remainder of the stock standing in the testator's name, the produce of which he did not re-invest, but kept for many years in considerable balances in his own hands:(*l*) where an executor being a trader paid the balances, which remained in his hands in respect of assets, into his banker's, and there mixed them with his own money.(*m*)

In *Forbes v. Ross*, where a testator directed trustees to lay out the residue of his estate at such rate of interest as they should judge reasonable; and after his death one of the trustees borrowed a part of the fund at 4*l*. per cent.; the Court added 1*l*. per cent. to the interest, charging the trustee, who borrowed the money, with 5*l*. per cent. interest on it.(*n*)

When an executor or trustee is compelled to pay interest, payment of the principal with rests, or compound interest, will in particular cases be decreed.(*o*) But in several instances the Court has refused to make this order.(*p*)

An executor may be decreed to pay interest in the case, amongst others, of a bill filed by a creditor,(*q*) or by a legatee, general(*r*) or residuary.(*s*) Interest has been charged against the estate of an executor, in whom was united the character of trustee also, and who became a bankrupt.(*t*)

[*516] *In some instances a Court of Equity has refused to oblige an executor to pay interest,(*u*) as—"for money admitted by the account to be in his hands:"(*v*) for arrears of rent, which executors had neglected to recover, and with which the Court charged them:(*w*) and for rents and profits of real estate, that was devised to an executor in trust.(*x*)

(*k*) *Mosley v. Ward*, 11 Ves. 581.

(*l*) *Crackelt v. Bethune*, 1 Jac. & W. 586.

(*m*) *Sutton v. Sharp*, 1 Russ. 146, 150.
See also *Hilliard's case*, 1 Ves. jun. 89.

(*n*) 2 Cox, 113, 2 Bro. C. C. 430. According to Brown's statement of the will, the trustees were directed to lay out the money "at such rate of interest as they should think reasonable;" but, according to the same reporter, the judgment of the Court proceeded on the ground, that the will directed the trustees to procure "the best and utmost interest," and the case is so cited, 1 Madd. 304.

(*o*) *Raphael v. Boehm*, 11 Ves. 92, 13 Ves. 407, 590, cited 1 Madd. 300, and 2 Sim. 519; *Stacpoole v. Stacpoole*, 4 Dow. P. C. 209.

(*p*) *Dornford v. Dornford*, 12 Ves. 127, cited 1 Madd. 301, 303; *Ashburnham v. Thompson*, 13 Ves. 402, cited 1 Madd. 303;

Tebbs v. Carpenter, 1 Madd. 290, 307; *Crackelt v. Bethune*, 1 Jac. & W. 586; *Attorney General v. Solly*, 2 Sim. 518.

(*q*) *Crackelt v. Bethune*, 1 Jac. & W. 586.

(*r*) *Holmes v. Dring*, 2 Cox, 1.

(*s*) *Seers v. Hind*, 1 Ves. jun. 294; *Langford v. Gascoyne*, 11 Ves. 333.

(*t*) *Ex parte Brooke*, cited 12 Ves. 128, 130; *Dornford v. Dornford*, 12 Ves. 127, cited 1 Madd. 301.

(*u*) *Stewart v. Lord Blaney*, 2 Ridgew. P. C. 204; *Bruere v. Pemberton*, 12 Ves. 386. See also *Wilkins v. Hunt*, 2 Atk. 151, and *Ryves v. Coleman*, ib. 439.

(*v*) *Lowson v. Copeland*, 2 Bro. C. C. 156.

(*w*) *Tebbs v. Carpenter*, 1 Madd. 290.

(*x*) *Haslewood v. Baldwin*, Cas. T. Finch, 457.

SECTION VI.

OF ACCOUNTING FOR PROFITS MADE OF THE TESTATOR'S ESTATE.

AN executor, who makes profit of assets in his hands, is accountable for it, as part of the testator's estate.(y) Also when a trustee, or executor who is likewise trustee, makes any profit of the trust fund, this profit belongs to the *cestui que trust*, and not to the trustee or executor himself.(z) A profit so accountable for may be interest made of assets, or of the trust fund,(a) or a sum greater than the interest,(b) as profit produced by employing money in trade,(c) which may be a trading adventure, in which the executor embarks the money,(d) or may be the testator's trade continued by the executor.(e)

*When stock or money in the public funds, is sold by a trustee [*517] contrary to his trust, the *cestui que trust* has a right to elect to have the stock restored, or to have the produce of the sale paid to him.(f) And if he elects to have the stock restored, the trustee is not allowed to benefit by the circumstance, that he can replace the stock at a less price than that at which he sold it. It must be restored in such a manner, that he cannot get any money by the transaction.(g) For if the stock can be replaced for a sum less than that for which he sold, he will be ordered to invest the surplus in the same stock for the same uses.(h) If the *cestui que trust* elects to have the produce of the sale paid to him, it is payable with interest,(i) at 5l. per cent.,(j) or at a greater rate if the trustee has made more than 5l. per cent. interest.(k)

SECTION VII.

OF LOSSES, IN CASE OF LOAN OR INVESTMENT.

It is decided by a Court of Equity, that an executor or trustee is not by the general power of his office, authorised to lend an infant's money

(y) *Ratcliffe v. Graves*, 1 Vern. 196, 2 Ch. Cas. 152; *Lee v. Lee*, 2 Vern. 548; *Harcocock v. Wrenham*, 1 Brownl. & G. 77. See *Grosvenor v. Cartwright*, 2 Ch. Cas. 21, cited ib. 152, and 1 Vern. 197. The doctrine contained in *Adams v. Gale*, 2 Atk. 106, and in *Child v. Gibson*, ib. 603, is overturned by many modern cases; 1 Madd. 303, 304. The difference taken in *Bromfield v. Wytherley*, Prec. Ch. 505, is likewise overruled; 1 Cox, 25.

(z) *Lee v. Lee*, 2 Vern. 548; *Piety v. Stace*, 4 Ves. 622; *Adye v. Feuilletau*, 1 Cox, 25.

(a) *Ratcliffe v. Graves*, 1 Vern. 196, 2 Ch. Cas. 152; *Lee v. Lee*, 2 Vern. 548; *Horsley v. Chaloner*, 2 Ves. 83, 85. See *Linch v. Cappy*, 2 Ch. Cas. 35.

(b) *Pocock v. Reddington*, 5 Ves. 794, 799, 800.

(c) *Godb.* 32.

(d) See *Brown v. Litton*, 1 P. W. 140, 10 Mod. 20.

(e) *Luntley v. Royden*, Cas. T. Finch, 381; *Heathcote v. Hulme*, 1 Jac. & W. 128, 131. See *Walker v. Woodward*, 1 Ross. 107; and see likewise, 9 Mod. 5th ed. 460.

(f) *Harrison v. Harrison*, 2 Atk. 121; *Bostock v. Blakeney*, 2 Bro. C. C. 656; *Ex parte Shakeshaft*, 3 Bro. C. C. 197; *Forrest v. Elwes*, 4 Ves. 497.

(g) *Earl Powlet v. Herbert*, 1 Ves. jun. 297.

(h) *Ibid.*

(i) *Forrest v. Elwes*, 4 Ves. 497.

(j) *Pocock v. Reddington*, 5 Ves. 794; *Long v. Stewart*, ib. 800, n.; *Bate v. Scales*, 12 Ves. 402.

(k) *Pocock v. Reddington*, 5 Ves. 799, 800.

on personal security;(l) and that therefore he renders his own property liable to make good any loss occasioned by his lending such money on the security of either a bond,(m) or promissory note.(n) And the like responsibility is incurred, although the money lent belongs [*518] not to an infant, but to an adult *person. In *Adye v. Feuilletau*, executors were held to be personally responsible for infants' money, which they had lent on bond; and counsel inquiring of Lord Loughborough,—“Does your Lordship decide upon the ground of its being infants' money?” Lord Loughborough replied,—“Upon the ground of its being trust money. The circumstance of their being infants only affects the case, inasmuch as it is impossible there can be any circumstances of conduct in them, which can authorise the executor, as there might have been, had they been adults.”(o)

Executors have, by a Court of Equity, been held not to be authorised to lend trust money on personal security, although the will empowered them to act and do as they should think would be most for the advantage of the *cestui que trust* or legatee;(p) and, in another case, although the will empowered them to lay out a legacy “in the funds, or on such other good security as they could procure and think safe.”(q) And in a third case, where a person bequeathed 500*l.* to his executors, in trust to place out the same upon real or personal security, as should be thought good and sufficient; and the executors lent the money to a trader on his bond; it was decided, that the authority given to the executors did not extend to an accommodation or to empower them to accommodate a trader with a loan of the money.(r) And, in the first and last of these three cases, the borrower having become a bankrupt, the executors were decreed to be personally answerable for the loss.

It is, however, to be mentioned, that in a late case a Court of Law seems to have expressed an opinion, that, at law, an executor may not be guilty of a devastavit, by lending, on private and personal security, money which is not wanted for present purposes, the executor exercising in the loan a fair and honest discretion.(s)

In *Marsh v. Hunter*, it appears Sir John Leach ruled, “that if trustees may invest in stock, or on real security, and they lend [*519] *on personal security, and thereby the money is lost, they shall be answerable, not for the amount of stock, which might have been purchased, but for the principal money lost. If real security had been taken, the principal money only would have been forthcoming to the trust, and the want of real security is all that is imputable to the trustees.”(t) On investing money on real security, it may here be added, that Lord Harcourt seems to have expressed an opinion, that an executor who puts out money on real security, is not personally answerable for a

(l) 1 Cox, 25; 2 Cox, 1; 3 Swanst. 87.

(m) *Adye v. Feuilletau*, 1 Cox, 24, 3 Swanst. 84, n.; *Holmes v. Dring*, 2 Cox, 1; which cases contradict *Harden v. Parsons*, 1 Eden, 145, cited 3 Swanst. 62, and 86, n.; *Harvey v. Parsons*, 8. C., cited 1 Cox, 24, 25.

(n) See the cases in the last note, and *Ryder v. Bickerton*, 3 Swanst. 80, n., 1 Eden, 149, n.; *Vigraas v. Binfield*, 3 Madd. 62; and *Koble v. Thompson*, 3 Bro. C. C. 112.

(o) 3 Swanst. 87, n.

(p) *Terry v. Terry*, Prec. Ch. 273, Gilb. Eq. Rep. 10.

(q) *Wilkes v. Steward*, Cooper, 6.

(r) *Langston v. Ollivant*, Coop. 33. See 1 Ves. & B. 359.

(s) *Webster v. Spencer*, 3 Barn. & Ald. 363, 364.

(t) 6 Madd. 295

loss occasioned by a failure of that security, if it was one, which, at the time of the investment, there was no ground to suspect. (u)

When the Court of Chancery invests trust money in the public funds, it, except in particular cases, (v) constantly invests it in the three per cent. consolidated bank annuities. (w) And as the Court will protect an executor or trustee in doing what it would itself order him to do, (x) the stock mentioned is that, in which an executor or trustee, whose duty leads him to lay out money in the public funds, will, in general cases, if he acts prudently, invest it. *If laid out in the [*520] three per cent. consolidated bank annuities, and the stock happens afterwards to fall in its price, the *cestui que trust*, or party beneficially entitled to the trust money, is, although an infant, bound, and the executor or trustee is not answerable for the loss. (y) But by the decision of, or opinion expressed in, a Court of Equity, it appears an executor or trustee is personally responsible for a loss occasioned to the trust estate, by his laying out trust money in any other stock, (z) as in bank stock, (a) bank long annuities, (b) or South Sea stock. (c)

SECTION VIII.

OF PARTING WITH PROPERTY TO A CO-EXECUTOR.

IN *Crosse v. Smith*, G. executed a bond to R., and by his will appointed M. and S. executors, who proved the will, and administered. The defendant S. lived at Southampton, and the defendant M. resided in London. R. wrote to M. requiring payment of the bond. The defendant

(u) 1 P. W. 141. It may here be mentioned, that the words "real security," in their common sense and acceptation, mean mortgages, or other incumbrances, affecting land. "The word *real*," Lord Hardwicke says, "is a term adopted in the law, and [real securities] can never be understood in any other sense than *landed securities*; as, for instance, in the distinction which has been made between real composition and modusses; real composition does not mean any substantial, permanent security for the payment of the composition, but land substituted in lieu of *zithes*, or a rent-charge issuing out of land." 3 Atk. 808, 809.

(v) *Caldecott v. Caldecott*, 4 Madd. 189, where a will directed dividends to be paid at Lady-day and Michaelmas; and for this reason, the Court ordered the trust-money to be laid out in the three per cent. reduced annuities, the dividends of this stock being payable at the times mentioned. In *Lord v. Godfrey*, 4 Madd. 455, the Court would not permit executors to change bank long annuities, an expiring fund, into three per cent. consols., as by this means the relative interests of the legatees would be altered. In *Davies v. Wattier*, 1 Sim. & St. 463, a sum of navy five per cent. annuities was ordered to be

transferred to the Accountant General, the Court appropriating this money for the payment of an annuity bequeathed.

(w) *Hancom v. Allen*, 2 Dick. 498; *Peat v. Crane*, ib. 499, n.; *Franklin v. Frith*, 3 Bro. C. C. 433; *Howe v. Earl of Dartmouth*, 7 Ves. 137, 151; *Holland v. Hughes*, 16 Ves. 114, 3 Meriv. 685; *Norbury v. Norbury*, 4 Madd. 191.

(x) *Ex parte Champion*, cited 3 Bro. C. C. 147, and 7 Ves. 150; *Franklin v. Frith*, 3 Bro. C. C. 434; *Hancom v. Allen*, 2 Dick. 498. See also 4 Ves. 369.

(y) *Ex parte Champion*, cited 3 Bro. C. C. 147, and 7 Ves. 150; *Peat v. Crane*, 2 Dick. 499, n. See also 1 Dick. 126.

(z) *Hancom v. Allen*, 2 Dick. 498. See *Allen v. Hancom*, 7 Bro. P. C. ed. Toml. 375.

(a) 3 Atk. 444; 7 Ves. 150, 151, 152, 193. On bank annuities, see 3 Atk. 444.

(b) See 7 Ves. 193, and *Lord v. Godfrey*, 4 Madd. 455.

(c) *Trafford v. Boehm*, 3 Atk. 440, 444. On South Sea annuities, see 3 Atk. 444, and *Adie v. Fennillitessu*, 2 Dick. 499, n. The correct name of this case is probably *Adye v. Feuilliteau*, which, on another point, is reported in 1 Cox, 24, and 3 Swanst. 84, n.

S., having 400*l.* of G.'s effects in his hands, remitted that sum to M. for the purpose of paying this bond, of which he had notice from M. At the time of the remittance, M. was in good credit; and S. knew that he was a simple-contract creditor of G. to a larger amount than 400*l.* M. applied the 400*l.* towards the payment of the simple-contract debt due from G. to him. Afterwards M. became bankrupt. In an action brought by a [*521] creditor, namely, on the bond, against the executors, a Court of Law stated the question to be, "whether S., *having once, as executor of G., had 400*l.* of G. in his hands, liable to the payment of R.'s bond debt, and capable of being so applied, is discharged in point of law, by having paid that money over to his co-executor, M., for the purpose of being applied by such co-executor in payment of this bond, but who was afterwards guilty of a *devastavit* in respect thereto." And the Court decided, that "S., having once received, and fully had under his control, assets applicable to the payment of this bond debt, was responsible for the application thereof to that purpose; and such application having been disappointed by the misconduct of his co-executor, whom he employed to make the payment in question, he is liable for the consequences of such misconduct, as much as if the misapplication had been made by any other agent, of a less accredited and inferior description." And, accordingly, a verdict, which had been found against S., was adjudged to stand.^(d)

The remaining cases noticed in this section have occurred in a Court of Equity.

In a case before Lord King, it was in argument stated by counsel, that his Lordship "adjudged in the case of *Lane v. Wroth*, that if one executor pays over to another executor money of the testator he has received, this shall not discharge him of it. And in the case of *Stanley v. Darlington*, the Master of the Rolls was of the same opinion, it coming before him in judgment on the Master's special report in 1727."^(e) In *Townsend v. Barber*, a person by his will appointed three executors; who all proved. S. principally acted, and possessed the estate, and, among other particulars, fourteen East India bonds, which he permitted W., another of the executors, to get into his possession, who disposed of them, and afterwards became a bankrupt, whereby they were lost to the testator's estate. Sir T. Clarke decided, and in favour, it should seem, not of creditors, but residuary legatees, that the assets of S. were liable to make good the loss of the bonds. And this decision he grounded on the circumstances, that S. possessed the bonds, and had a right to keep [*522] possession, and that he voluntarily and unnecessarily permitted W. *to take them, and carry them away.^(f) In *Sadler v. Hobbs*, Lord Thurlow stated,—“I take it to be clear, that where by any act, or any agreement, of the one party, money gets into the hands of his companion, whether a co-trustee or co-executor, they shall both be answerable.”^(g) And again,—“Where one executor takes the money but of his own authority, his companions shall not be charged;^(h) but if he puts the money into the hands of his companion, he shews he had it in his power to secure it, and that his companion, for some reason, was

(d) 7 East, 246, 3 Smith, 203.

(e) Mosely, 36.

(f) 1 Dick. 356.

(g) 2 Bro. C. C. 116. See also *Capell*

v. Gostow, Toth. 88.

(h) To this effect, see also *Herbage v. Backshaw*, Toth. 86, and *John v. Kingston*, ib. 87.

permitted to obtain possession of the money.”⁽ⁱ⁾ In *Balchen v. Scott*, T. and W. were executors. Both proved the will, but the former alone acted, and afterwards became insolvent. W. received a letter by the post from a debtor to the estate, inclosing a bill of exchange for 100*l.* on account of his debt; which bill he immediately sent to the acting executor. On the ground that W. was not an acting executor, Lord Loughborough decided that W. was not liable, in favour of the residuary legatee, to make good the money lost.^(j) In *Bacon v. Bacon*, B. and K. were executors of a person who lived in Suffolk. B. resided in London, and K. at Ipswich. K. called on B. in London, and requested an advance of 700*l.*, to enable him to discharge the funeral expenses, and to pay such of the creditors of the testator as lived in the neighbourhood; with which request, K. informing B. he had no money belonging to the testator in his hands, B. immediately complied; knowing that considerable debts were owing from the testator to persons in the neighbourhood of K. And, under similar circumstances, B. at another time advanced 500*l.* to K. K. died insolvent; and the Master having allowed B. only 787*l.* 2*s.* 2*d.*, being the amount of the debts actually paid by K., B. excepted to the report. And Lord Loughborough, by allowing this exception, discharged B. from the loss occasioned to the estate. His Lordship *re-
 [*523]
 lied on the facts, that “K. was in no insolvent circumstances; was a man in business at Ipswich; had been the attorney of the testator; was acquainted with all his affairs; had his accounts in his hands; and the first payment was three weeks after his death; and the payment was made by B. only because he happened to have money of the testator’s in his hands at the time.” His Lordship appears also to have thought, that as B. lived in London, it was, “in the ordinary management of executor,” necessary and lawful to remit the money to K., to pay the debts; and that it was not in B.’s power “to pay the funeral expenses, and the number of small debts appearing on the books of the testator, without sending the money.”^(k) In *Langford v. Gascoyne*, G., S., and L., the defendants, were executors; and the Master charged all of them with the receipt of 761*l.* 5*s.*, under these circumstances, proved by the affidavit of a witness; stating that the day after the testator’s funeral, the three executors met at the house of the testator; and Mrs. L., the widow, left the room to fetch a bag of money; and, upon her return with it asked the deponent, to which of the defendants she should deliver it; and the deponent, not then having a good opinion of G.’s circumstances, advised her to deliver it to S.; upon which she passed by G. and L., and delivered the bag into the hands of S., who counted the money over, and then delivered it into the hands of G. Sir W. Grant held, that S., having possessed the money, and, without a sufficient excuse, delivered it out of his possession to G., was answerable for what afterwards became of it, and therefore the loss, which that parting with the money occasioned. As to the other executor, L., he said, “It is impossible to charge him; he has neither done nor said any thing, that in any degree contributed to the loss of the money, or to its getting into the hands of G. It is not incumbent upon one executor by force to prevent its getting into the hands of

(i) 2 Bro. C. C. 116. See also *Dines v. Scott*, 1 Turn. & R. 360, 361, and *Crisp v. Spranger*, Nels. 109.

(j) 2 Ves. jun. 678; cited 7 Ves. 193.

(k) 5 Ves. 331; cited 7 East, 258, 7 Ves. 193, 11 Ves. 335, 16 Ves. 481, 1 Sch. & Lef. 341, and 3 Sim. 273.

another.”^(l) In *Davis v. Spurling*, W. B. and J. B. were entitled, as tenants in common in fee, to a freehold estate. W. B., by his will, appointed J. B., and C. and S., his executors; and empowered [*524] J. B. to sell his, the testator’s, moiety of the freehold estate; and directed the purchase-money to be applied and disposed of in the same manner as his personal estate, subject to the payment of his funeral and testamentary expenses, and debts. The three executors proved the will; and J. B. sold the freehold estate, as well W. B.’s moiety as his own, and in the sale employed, as his agent, his co-executor C. And on the execution of the conveyance by J. B., C. received the price of the estate from the purchaser, and paid it over to J. B.’s banker, on J. B.’s separate account. The money was afterwards misapplied by J. B.; and for this misapplication Sir J. Leach held, “that C. was not answerable; that C. had no legal right to retain the price of W. B.’s moiety of the estate; for it was in his hands, not as executor, but simply as agent of J. B., who alone had the power to sell that moiety, and to receive the price of it.”^(m)

From *Crosse v. Smith* it is, perhaps, to be inferred, that a Court of Law is less lenient, than a Court of Equity is, to an executor, who parts with assets to his co-executor. And from the remaining authorities, that have been noticed in this section, these general conclusions may, it seems, be drawn,—that, in a Court of Equity, it is, generally speaking, the duty of an executor not to part with assets to a co-executor; but that, in some instances, this transfer may be safely made; and that whenever it is made, the executor who so disposes of the assets cannot, in case of loss, justify the act, unless it is done from some reasonable cause. These conclusions appear to be expressed by Sir W. Grant, when he says,—“The rule in all the cases is, that if an executor does any act, by which money gets into the possession of another executor, the former is equally answerable with the other: not where an executor is merely passive, by not obstructing the other in receiving it. But if the one contributes in any way to enable the other to obtain possession, he is answerable, unless he can assign a sufficient excuse, as there was in *Bacon v. Bacon* a justifiable object.”⁽ⁿ⁾ And the same doctrine seems to be thus expressed by Sir J. Leach,—“Where an executor, possessing assets of his testator, hands over [*525] those assets to a co-executor, and they are *misapplied by that co-executor, there the executor, who so hands them over shall be answerable for their misapplication; because he had a legal right to retain them, and might have preserved them, and it was his duty to do so, unless, indeed, they were so handed over for the express purpose of a special administration by the co-executor, as for the payment of a particular debt.”^(o)

SECTION IX.

OF AN EXECUTOR’S LIABILITY FOR PROPERTY PLACED WITH BANKERS.

If an executor or trustee places money, or other assets, or trust estate,

(l) 11 Ves. 333.

(m) 1 Russ. & M. 64.

(n) 11 Ves. 335.

(o) 1 Russ. & M. 66.

to account in a bank, and afterwards the bankers become insolvent or bankrupts, such executor or trustee may, in some cases, not be personally responsible for the loss by this means occasioned, if the deposit was made *bond fide*, and from a sufficient cause, as for the purpose of temporary security of the property. (p) And a circumstance favourable to the exoneration of an executor is, that money paid by him into a bank was paid to the bankers, with whom the testator in his life-time chose to entrust his money. (q)

Executors or trustees, who, in the event of a loss by means of the failure of a bank, claim to be free from personal liability to make it good, may rest this claim on the principle, that a Court of Equity "does not expect them to take more care of the property entrusted to them, than they would do of their own." (r) Such an executor or trustee is, however, affected by this principle also,—"If you desire to deal for me as you would for yourself, it must be so, that the dealing for me, if [*526] unfortunate, shall not be *more so to me, than it would have been to you, if it had been for yourself." (s) The dealing may be unfortunate, in the event of the bankruptcy of the executor or trustee himself. And then if money, paid by the executor or trustee into a bank, was paid to his own private or general account there, this dealing for the *cestui que trust* may be more unfortunate to the latter, than the like dealing would have been to the executor or trustee, if he had dealt for himself. On the failure of the executor or trustee, his estate has all the benefit of the money; the parties for whom he acts have none: he does not therefore deal for them as he would for himself. (t) The result of the dealing is not as beneficial to them, as the like dealing would have been to the executor or trustee, if he had dealt for himself. (u) And when money is by an executor or trustee paid into a bank, it is consequently a cause to charge him personally with the loss occasioned by the failure of the bankers, that the money was paid in, not to an account of the trust estate, but to the executor's or trustee's own private credit or account. (v) In *Fletcher v. Walker*, a person by her will bequeathed two houses to her executor, in trust to sell, and apply the produce in payment of her debts, and to place the residue on real or government security, and apply the interest for the benefit of certain legatees. The executor sold the houses, and out of the purchase-money made some payments, and placed the residue in the hands of his banker, who afterwards failed. The executor was decreed to make good the sum, with interest; on the grounds, that, instead of investing the money according to the directions in the will, he placed it in a banker's hands, not appropriating it to the account of the legatees, but placing it generally in their hands, with other monies of his own; and that as the testatrix's debts were all paid, he had no excuse for placing the money at the banker's. (w) In *Rowth v. Howell*, a testator

(p) *Churchill v. Hobson*, 1 Eq. Cas. Abr. 241; *Attorney General v. Randall*, 21 Vin. Abr. 534, 2 Eq. Cas. Abr. 742; *Knight v. Earl of Plymouth*, 1 Dick. 120, 126, 3 Atk. 480, cited Amb. 219, 3 Ves. 566, and 11 Ves. 380; *Ex parte Belchier*, Amb. 219; *Adams v. Claxton*, 6 Ves. 226, 228, 231. *Salway v. Salway*, 4 Russ. 60.

(q) *Churchill v. Hobson*, 1 P. W. 243; *Knight v. Earl of Plymouth*, 1 Dick. 120, 3

Atk. 480, cited 3 Ves. 566.

(r) 1 Jac. & W. 247.

(s) 1 Jac. & W. 248.

(t) Ibid.

(u) 1 Jac. & W. 247

(v) *Wren v. Kirton*, 11 Ves. 377, cited 1 Jac. & W. 247; *Fletcher v. Walker*, 3 Madd. 74; *Mamey v. Banner*, 4 Madd. 413; 1 Jac. & W. 241. See also 11 Ves. 61.

(w) 3 Madd. 73.

[*527] directed his executors with all convenient speed to convert all his property *into money, and to apply the same first in paying his debts, and then to lay out the residue in mortgages. At the death of the testator, certain stock, bills, and bonds, and other negotiable securities, part of his property, to a considerable amount, were standing in the name and in the hands of his banker, transferred and endorsed to him by the testator, and in which banker the testator had great confidence. After the testator's death, and without the knowledge of the executors, the banker sold several of the securities, and soon afterwards died insolvent. Lord Loughborough held, that the executors were not to be charged with the loss. The banker, his Lordship observed, was possessed by the testator's act of the disposable securities(x).

SECTION X.

OF AN EXECUTOR'S CONTINUING THE TRADE OF HIS TESTATOR.

1. WHEN this continuance of the trade is not directed by the will of the testator.

2. When it is so directed.

1.—Generally speaking, the office of an executor does not authorise him to continue the trade of the testator; and, on the contrary, he commits a breach of trust by continuing the testator's property in it.(y) "A trade," says Lord Mansfield, "is not transmissible: it is put an end to by the death of the trader. Executors *eo nomine* do not usually carry on a trade; if they do so they run great risk; and, without the protection of the Court of Chancery, they would act very unwisely in carrying it on. I remember many instances of trade being carried on under the direction of the Court of Chancery."(z) The only way in which an executor can safely proceed to continue his testator's trade seems to be, to file a bill in Chancery, and to have by this means an inquiry directed, whether [*528] it would be for the benefit of *the parties beneficially interested, that the trade should be continued.(a) In *Wightman v. Townroe*, T. and D. were in partnership with W. in trade. W. died; and after his death his executors continued his share of the property in the trade, for the benefit of his infant daughter. The trade was thenceforth carried on under the same firm of T. and Co., as before W.'s death. In making up the accounts, the executors divided the profit and loss of the business with the other partners T. and D.; carrying on the business solely for the benefit of the daughter of W.; charging her in their account as executors with the loss; giving her credit for the profits of the trade; and taking no part of the profits to their own use. The business was managed by T., and it did not appear that the executors ever interfered, except in settling the accounts. The bill of exchange, stated in the declaration, was drawn by the plaintiff in favour of T. and Co., at the request of T., and for the use of the firm of T. and Co., upon an under-

(x) 3 Ves. 565.

(y) *Barker v. Parker*, 1 Durn. & E. 295;

Ex parte Watson, 2 Ves. & B. 415.

(z) 1 Durn. & E. 295.

(a) 1 Jac. & W. 130

taking, which they did not fulfil, to provide money for it when it should become due. It was afterwards endorsed by T. in the name of the firm of T. and Co., and was paid away in discharge of a debt of the firm. For the payment of this bill, the executors were held to be at law personally liable as partners in the trade. "The executors," it was said, "by embarking the property in trade in the first instance, contracted a responsibility in a Court of Law, which their subsequent application of the profits to purposes not of personal benefit cannot afterwards vary. At law they became the legal proprietors in respect of every thing belonging to the trade, and consequently are liable to the legal debts." (b) An executor who continues his testator's trade, and by his dealings makes himself a trader within the meaning of the bankrupt laws, may be made a bankrupt. (c) But if an executor only disposes of the stock of his testator, this exercise of his duty will not make him a trader, and liable to a commission of bankruptcy. And even if an executor is the representative of a wine-cooper, and, finding it necessary to buy wines to refine the stock *left by the testator, makes this purchase, this dealing will not make him a trader. (d) In *Ex parte Watson*, where a [*529] widow and administratrix of her husband entered into partnership with her husband's partners, and agreed that the whole of his share and property in the former partnership should continue in the new one, and a joint commission of bankruptcy issued against this firm; she was allowed as administratrix to prove, as a debt under the commission, a sum of money, the amount of principal and interest due from the partnership to her children, in respect of certain shares of their father's property by the custom of York. (e)

Parties beneficially entitled to the capital and stock, employed by an executor in his testator's trade, may compel him to render an account of the profits made in the trade, during the time it was carried on by him. To these profits they, and not the executor, are entitled. (f) And they are, moreover, at liberty to elect to take either those profits, or interest on the capital, and value of the stock employed. (g) If they decide to have interest, they are entitled to it at the rate of 5l. per cent. (h) In *Heathcote v. Hulme*, the plaintiffs insisted on their right to profits up to a certain time, and to interest from that period. A right of this kind might entitle the party to claim profit for the period the trade was productive, and interest for the time losses were incurred in it. (i) And on the circumstances in *Heathcote v. Hulme*, Sir T. Plumer decided, the plaintiffs could not call for profits for one period and interest for another; but must take either interest for the whole time that the trade was carried on, or profits for the whole time; (j) although it seems to be there acknowledged, that in some instances the Court might be disposed to allow the time to be divided. "Circumstances," it was said, "might

(b) 1 M. & Sel. 412.

(c) *Ex parte Nutt*, 1 Atk. 102; *Ex parte Watson*, 2 Ves. & B. 414.

(d) *Ex parte Nutt*, 1 Atk. 102.

(e) 2 Ves. & B. 414.

(f) *Luntley v. Rcyden*, Cas. T. Finch, 381; *Heathcote v. Hulme*, 1 Jac. & W. 128, 131. See also *Brown v. Litton*, 1 P. W. 140, 10 Mod. 20.

(g) *Ex parte Watson*, 2 Ves. & B. 415; *Heathcote v. Hulme*, 1 Jac. & W. 122; *Burden v. Burden*, cited ib. 134.

(h) *Heathcote v. Hulme*, 1 Jac. & W. 134, 135. See also *Attorney General v. Solly*, 2 Sim. 518.

(i) 1 Jac. & W. 128, 129.

(j) 1 Jac. & W. 122.

[*530] come to the knowledge of the executors, that would make it unconscientious *to continue the property longer in the trade; they might embark it in a new trade, or at a different place or in adventures substantially new at the same place." And without saying what would be the effect of such occurrences, it was admitted "it might then be argued, that it was a perfectly new concern, and gave to the *cestuis que trust* a new right to adopt or relinquish it."(*k*)

On the power or duty of executors to complete work, which, in the way of his trade, a testator has begun, or to fulfil an agreement entered into by the testator to perform certain work, and which at the time of his death was not begun, there occurs the following case of *Marshall v. Broadhurst*. In this cause, which was an action of *assumpsit*, the declaration contained two sets of counts. The first was for work and labour done, and materials found, and goods sold and delivered by the testator, laying the promises to the testator; and the second was for work and labour done, and materials found and used about such work and labour, and goods sold and delivered by the plaintiffs, as executors, laying the promises to the plaintiffs, as executors. The defendant pleaded *Non assumpsit*. At the trial before Tindal, C. J., the following appeared to be the facts of the case:—The defendant employed the testator to erect a temporary gallery, and other wood-work, for the purposes of a public dinner. Shortly after the order was given, and before it was begun, the testator died, and the plaintiffs, as executors, performed the work, using the materials of the testator. Upon these facts, it was objected, that the plaintiffs could not recover; that there was no evidence to support the first set of counts; and, with respect to the second set of counts, that there was no evidence of goods sold; that the work and labour were done on the personal contract of the executors, for which they could only sue in their individual capacity, and that the materials alleged to have been supplied for such work and labour could not be separated from the work and labour. The learned Chief Justice was of opinion, that the plaintiffs could not recover for the work and labour, but thought that

[*531] *they might for the materials, because the allegation was divisible; and the plaintiffs had a verdict for the amount of the materials, with liberty for the defendant to move to enter a nonsuit. Such a motion was accordingly made; and "*Per Curiam*.—It is a plain rule, that, whenever the subject matter of the action would, when recovered, be assets, the executor may sue in his representative character; *Ord v. Fenwick*,(*l*) *Cowell v. Watts*.(*m*) If a party contract for himself and his executors to build a house, and die, the executors must go on, or they would be liable to damages for not completing the work; if they go on, it is work and labour done by them as executors; they may recover as executors, and the money, when recovered, will be assets in their hands. Suppose a party to have engaged to build a house, and to have procured all the necessary materials; in the event of his death may not the executors complete the work, or must they dispose of the materials at a loss to the estate? Or if a man build half a house, and die, if the executors complete the work, are there to be two actions in respect of the same job? Such a rule would, in many cases, operate much

(*k*) 1 Jac. & W. 133.

(*l*) 3 East, 110.

(*m*) 6 East, 405.

to the deterioration of property. If, for instance, a bookseller undertake to publish a work in parts, and, before the completion, die, a subscriber has a claim upon his estate to complete the work, for otherwise those parts which he has purchased, upon the faith of the work being completed, are useless. When the law speaks of executors not carrying on the business of their testator, it means that they are not to buy and sell. We do not say that executors are bound to go on to an indefinite extent, but it is reasonable that they should do so to a certain extent. For instance, if a man make half a wheelbarrow, or half a pair of shoes, and die, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect state. It is otherwise where the testator enters into a personal engagement to be performed by himself only. In the absence of authority to the contrary, it seems *reasonable that the plaintiffs should recover under [*532] the circumstances of this case.”(n)

2.—A will sometimes directs the executors to carry on the trade of the testator;(o) and then the testator authorises the trade to be carried on either with the whole of his assets, or with a certain portion only, set apart for that purpose. In either case, if the executor continues to carry on the trade, he makes not only the testator's estate, so employed under the will,(p) but himself personally, and his own property, liable to debts incurred in the trade after his commencement to carry it on;(q) and moreover makes himself personally liable to the bankrupt laws.(r)

If a testator authorises his trade to be continued with the whole of his property, then the whole of it is accordingly subject to the debts contracted in the trade.(s) But if, as it more frequently perhaps happens, the testator limits the property he means to be so employed, then this portion only, which he so sets apart, is responsible to the creditors, and his general assets are not liable to their debts.(t) Such portion may be the testator's capital in the trade,(u) or a specific sum by the will authorised to be traded with,(v) or it may be, after legacies bequeathed, the residue of the testator's personal estate.(w)

If a person bequeaths legacies, and directs his trade to be, after his death, carried on with a particular part only of his property, but without limitation of time, it appears that if the party, who under the will continues the trade, becomes a bankrupt, only the property declared to be embarked in the trade is answerable *to the creditors; and [*533] that “the creditors of the trade, as such, have not a claim [*533] against the distributed assets in the hands of third persons under the direction of the same will, which has authorised the trade to be carried on for the benefit of other persons.”(x) In a case of this kind, the

(n) 1 Crompt. & Jerv. 403.

(o) See *Wilkinson v. Stafford*, 1 Ves. jun. 32.

(p) 10 Ves. 122; *Buck*, 209; 3 Madd. 157.

(q) *Hankey v. Towgood*, *Cooke B. L.* 67, and 8th ed. 78, in marg.; *Ex parte Garland*, 10 Ves. 119, 120, 121; *Ex parte Richardson*, 3 Madd. 157, *Buck*, 209.

(r) *Hankey v. Towgood*, and *Ex parte Garland*, above; *Viner v. Cadell*, 3 Espin. 88.

(s) 10 Ves. 120, 122; 3 Madd. 157.

(t) 10 Ves. 122; 3 Madd. 157.

(u) *Ex parte Richardson*, 3 Madd. 138, *Buck*, 202, 421.

(v) *Ex parte Garland*, 10 Ves. 110, 1 Smith, 220, cited 3 Madd. 157.

(w) *Hankey v. Hammond*, or *Hammock*, *Cook B. L.* 67, and 8th ed. 78, in marg.; 3 Madd. 148, n., *Buck*, 210; cited 10 Ves. 119, 1 Smith, 225, 3 Madd. 157, and *Buck*, 210; *Hankey v. Towgood*, *Cook B. L.* 67, and 8th ed. 78, in marg.

(x) *Ex parte Garland*, 10 Ves. 110, 122, 1 Smith, 220.

question, it seems to be stated, goes to this—whether “where a testator directs a trade to be carried on, and without limitation, all the other purposes of his will are to stand still, or all the administration under it to be so checked, that every person taking is in effect to become a security in proportion to the property he takes, and to the extent of all time, for the trade, which the testator has directed to be carried on. The inconvenience would be intolerable; amounting to this, that every legatee is to hold his legacy upon terms, connected with transactions, by which he cannot benefit, which he cannot control, and which may cut down all his hopes, as far as they are founded upon his receipt of that bounty.”(y) And on a case of this nature Lord Eldon expressed his opinion, that “it is impossible to hold that the trade is to be carried on, perhaps for a century; and at the end of that time, the creditors dealing with that trade are, merely because it is directed by the will to be carried on, to pursue the general assets, distributed perhaps to fifty families.”(z)

When an executor, directed by the will to carry on the testator's trade, employs in it, out of the assets, a sum of money not applicable for the purpose, and he becomes a bankrupt, the money so employed may be proved as a debt under the commission.(a)

When a testator desires his trade to be carried on by a particular person, to whom he directs his executors to lend a limited sum for the purpose, and upon a particular trust; and such person after the money lent becomes a bankrupt; the executors may come in and prove for the debt so incurred, but in payment are postponed to all the other creditors of the bankrupt.(b)

[*534]

*SECTION XI.

OF AN EXECUTOR'S LIABILITY, WHERE HE IS OBLIGED TO REFUND MONEY RECEIVED, AND AFTERWARDS PAID AWAY BY HIM.

In *Pooley v. Ray*, a sum of 700*l.*, supposed to be due on mortgage, was, after the death of Sir J. C., the mortgagor, paid to J. R. the executor and brother of C. R. the mortgagee. Afterwards it appeared by a copy of an account under the mortgagee's own hand, that a part of the money had been paid by the mortgagor in his life-time. And on a bill brought to be relieved against this over-payment, the defendant, the executor of the mortgagee, answered and insisted that, before any notice of the plaintiff's demand on account of this over-payment, the defendant, as executor of the mortgagee, had paid away the 700*l.* in the debts of his testator. Nevertheless, the Master of the Rolls decreed the money overpaid to be paid back by the executor; and he to be at liberty to sue such creditors, as through mistake he had paid, to make them refund. And, on appeal, Lord Cowper affirmed the decree; “declaring, that though this might be a hard case, yet if the plaintiffs had a right to be

(y) 10 Ves. 119.

(z) 10 Ves. 122.

(a) *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Madd. 138, Buck, 202.

(b) *Ex parte Garland*, 10 Ves. 110, 112, 1 Smith, 220. See Buck, 209.

repaid their money, which they had overpaid on the mortgage, this right could not be overthrown by the defendant the executor's applying the money in any manner he should think fit; any more, than if an executor at law should recover a debt, and pay the testator's debts with it, and afterwards this judgment recovered by the executor is reversed in error; the executor must restore the money to the plaintiff in error; and his having paid it away in debts of his testator will not excuse him from paying it back. So, in the same manner, if there were a decree for the executor to be paid a sum of money by the defendant, and the executor, having received the money, pays it away in debts; and then the defendant, against whom the executor had recovered the decree, brings an appeal, and reverses the decree; the plaintiff in the appeal shall be restored to the money. *Secus*, if the defendant had *delayed [*535] the appeal, and willingly stood by, whilst the executor paid away this money to the testator's creditors; for this would be drawing the executor into a snare; but nothing of this kind appearing in the present case, affirm the decree." And from the Registrar's book it appears, "His Lordship was of opinion, that although the defendant R.'s payment of 700*l.* amongst his brother's creditors be an accident, which falls hard upon him, yet it is impossible for the plaintiff to make them parties. And there being an evident mistake in the former account, there ought to be a refunding by the defendant R., of what he has been overpaid, although he hath applied the same in satisfaction of his brother's debts; and the rather, for that it is doubtful whether he did not know how the accounts stood between his brother, the testator, and Sir J. C., before such application made."(c)

SECTION XII.

OF SUBMISSION TO ARBITRATION.

IN some cases, an executor may incur personal responsibility to creditors of his testator, by referring matters to arbitration.(d) In *Barry v. Rush*, which was an action of debt on bond, the plea first craved oyer of the bond (by which the defendant, as administrator, bound himself, his heirs, executors, and administrators, to the plaintiff as executrix,) and then of the condition, which (after reciting that the plaintiff and defendant had agreed to submit to arbitration certain disputes, which had before arisen between the plaintiff and the defendant's intestate, touching certain articles of agreement between the intestate and the plaintiff's testator) was for the performance of an award, to be made by arbitrators concerning the matters aforesaid, and also concerning all other matters, accounts, &c. between the said parties, or either of them. *It [*536] then set forth that the arbitrators had awarded, that the defendant, as administrator, should pay to the plaintiff, as executrix, 298*l.* on the 17th June following, and that the parties should execute general

(c) 1 P. W. 355, and 5th ed. 357, n. (1); 11; 11 Vin. Abr. 308, pl. 23; Wentw. Off. cited 2 Ves. jun. 93, 583. Ex. Ch. 13, 14th ed. p. 304.

(d) Anon. 3 Leon. 53. Ca. 77.—12 Mod.

releases. The defendant then pleaded that he had fully administered and that at the time of entering into the bond, or afterwards he had no assets. And, on demurrer, this plea was held to be bad. The Court was of opinion, the defendant had by the obligation bound himself personally, and gave judgment for the plaintiff; Ashhurst, J., saying,—“The entering into the bond amounts to an admission of assets; and the defendant shall not afterwards be permitted to dispute it. The bond given by the defendant to abide by the award was an undertaking to pay whatever sum the arbitrator should award, without any regard to assets.”(e) This case is not an authority, that the mere circumstance of an executor’s entering into an arbitration bond amounts to an admission of assets; but was determined on the ground, that there the bond was a personal engagement by the defendant to perform the award, and he submitted, in broad terms, to pay whatever should be awarded.(f) And in *Pearson v. Henry*, a submission by the defendant, an administrator, to an award was held not to be, in the circumstances of that case, evidence to charge the defendant with assets; a clear decision, that a submission to arbitration by an executor or administrator is not of itself an admission of assets.(g) In *Pearson v. Henry*, the arbitrator only ascertained the amount of the debt due from the intestate, and did not direct the defendant to pay it; and there was no ground, which made it possible to say, that the arbitrator decided that the defendant had assets.(h) These circumstances distinguish *Pearson v. Henry* from *Worthington v. Barlow*, where by the terms of a submission to arbitration by the defendant, an administratrix, the submission was a reference not only of the [*537] cause of action, but also of the other question, whether or not the administratrix had assets. And as the arbitrator awarded the defendant to pay the amount of the plaintiff’s demand, it was held to be equivalent to determining, as between these parties, that the administratrix had assets to pay the debt. She was, it was held, concluded by this award; and accordingly, although it was stated she had no assets, she was compelled by attachment to pay the sum, which the arbitrator had directed her to pay.(i) In *Robson v. Anonymous*, the plaintiffs, who were assignees of a bankrupt, moved that so much of an award as directed the payment by them of a sum of money, and the costs of the reference, might be set aside; upon the ground, that their bankrupt’s estate and effects were exhausted. The motion was refused by Lord Eldon, who said,—“If an executor or administrator think fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission. I see no distinction in the case of an assignee of a bankrupt.”(j) In *Riddell v. Sutton*, an agreement stated, that disputes and differences had arisen, and were depending, between the plaintiff and the defendant, as executrix, respecting certain unsettled accounts between them; therefore, for the finally settling such disputes and differences, it was agreed that the said matters in dispute should be, and they were

(e) 1 Durn. & E. 691, cited 5 Durn. & E. 7, 8.

(f) 5 Durn. & E. 7, 8.

(g) 5 Durn. & E. 6; cited 7 Durn. & E. 453. See *Love v. Honeybourne*, 4 Dowl. & RyL. 814, 815; *Davies v. Ridge*, 3 Espin.

101; and *In re Wansborough*, 3 Chitt. 40. And see, farther, 5 Bing. 206, 208.

(h) 5 Durn. & E. 7; 7 Durn. & E. 453.

(i) 7 Durn. & E. 453.

(j) 2 Rose, 50, cited 5 Bing. 206.

thereby, referred to the final award of T. R. and T. B. The arbitrators found that there remained a balance due from the defendant to the plaintiff, and by their award they therefore directed the payment of such balance. To an action of debt on this award, the defendant pleaded *plene administravit*, and, on demurrer, this plea was held not to be an answer to the plaintiff's demand, and judgment was given for the plaintiff; Park, J., saying,—“Looking at the recital in the submission, and at the whole of the case, I think it clear that the defendant admitted assets, and submitted to a final settlement of all disputes: that could not be but by paying what should be found due.”(k)

*SECTION XIII.

[*538]

OF AN EXECUTOR'S LIABILITY IN CERTAIN INSTANCES OF TRUSTS.

NUMEROUS cases occur, in which, by the decision of, or opinion expressed in, a Court of Equity, trustees, or trustees in whom was united the character of executors also, have been held to be responsible out of their own property for a breach of trust, or acts done by them, which occasioned a loss to the beneficial owners of the trust estate;(l) as in the instances—of money raised out of an estate limited for the payment of debts and legacies, and converted to the trustee's own use:(m) of a loss occasioned by trustees under a will to their testatrix's estate, through an omission of the trustees to re-invest certain stock immediately, which had been sold, and the produce for some time placed in the hands of their bankers:(n) of money paid to a person under an express power for the purpose, but without the previous consent of a third party, as required by the power:(o) of money laid out in a purchase of real estate, bought by the trustee for himself:(p) of money kept by a trustee in his own hands, contrary to a trust to *invest it:(q) of arrears of rent, [*539] which trustees neglected to recover:(r) of a legacy of a debt due to a testatrix, and which debt, owing by an executor of the will, a co-executor neglected to call in.(s)

(k) 5 Bing. 200, 2 Moore & P. 345.
 (l) Tilaly v. Throckmorton, 2 Ch. Cas. 132; Palmer v. Jones, 1 Vern. 144; Jevon v. Bush, ib. 342; Emelie v. Emelie, 7 Bro. P. C. ed. Toml. 259; Anon. 12 Mod. 560; Gifford v. Manley, Cas. T. Talb. 109; Earl of Litchfield's case, 1 Atk. 87, 1 West Cas. T. Hardw. 201; Ivie v. Ivie, 1 Atk. 429, 1 West. Cas. T. Hardw. 318; Okeden v. Okeden, or Walker, 1 Atk. 650, 1 West Cas. T. Hardw. 514; Vernon v. Vawdrey, Barn. Ch. Rep. 280, 303, 304, 2 Atk. 119; Boardman v. Moorman, 1 Bro. C. C. 68; Cooper v. Douglas, 2 Bro. C. C. 232; Caffrey v. Darby, 6 Ves. 488; Walker v. Symonds, 3 Swanst. 1. Anon. cited 3 Swanst. 79, n.; Ex parte Greenhouse, 1 Madd. 92; Dimes v. Scott, 4 Russ. 195; Carsey v. Barsham, stated 1 Sch. & Lef. 344. See also Smith v. French, 2 Atk. 243; Trafford v. Boehm, 3

Atk. 440, 444; Wilkinson v. Stafford, 1 Ves. jun. 32; Vez v. Emery, 5 Ves. 141; Anon. v. Osborne, 6 Ves. 455. See, moreover, Henriques v. Franchise, Prec. Ch. 205; Thayer v. Gould, 1 Atk. 615, cited 2 Atk. 245; and Conyngham v. Conyngham, 1 Ves. 522. And, farther, 2 Atk. 406, 1 Sch. & Lef. 272, and Ashby v. Blackwell, 2 Eden, 299, Amb. 503.

(m) Anon. 1 Salk. 153.

(n) Bone v. Cook, M'Clel. 168, 173, 316 c.

(o) Bateman v. Davis, 3 Madd. 98.

(p) Cox v. Bateman, 2 Ves. 19. See Kirk v. Webb, 2 Freem. 229.

(q) Byrchall v. Bradford, 6 Madd. 13, 235; Brown v. Sansome, M'Clel. & Y. 427.

(r) Tebbs v. Carpenter, 1 Madd. 290, 297.

(s) Mucklow v. Fuller, Jacob, 198.

SECTION XIV.

OF AN EXECUTOR'S CONCURRING IN CERTAIN ACTS.

ALL executors appear to be trustees, inasmuch as the duty to execute the will is a trust.^(t) Yet they may, perhaps, be called mere executors, when they possess the general personal estate of the testator, upon the general trusts only of an executorship. And they seem to be peculiarly executors in trust, and to be so denominated, when they possess a certain part of the testator's property, upon particular trusts only.^(u) By proving the will, an executor has been held to have accepted the trusts annexed to a legacy bequeathed.^(v)

Some acts done in a trusteeship, or mere executorship, or executorship in trust, require the concurrence of all the trustees or executors. Acts of this kind are, the signing of a receipt for trust-money,^(w) and the transferring of stock or money in the public funds.^(x) An executor's or trustee's concurrence in the act of a co-executor or co-trustee often draws to it responsibility. In *Hovey v. Blakeman*, an executor in trust was held to be responsible for money come to the hands of his co-executor, on the ground that he concurred in the application of that money.^(y)

[*540] *And responsibility may, in certain cases, follow an act, which is done by a trustee or executor from necessity or for conformity only; but who in the transaction is in some way guilty of a neglect of duty, or breach of trust.^(z) This will fully appear in the progress of the present Section; in which it is proposed to consider the law on concurrence,

1.—When the act is the signing of a receipt;

2.—When, by the act concurred in, money comes into the hands of one of several executors or trustees;

3.—When this act, by which an executor or trustee obtains possession of money, is the selling out of stock.

1.—When trust-money is paid to trustees, or to one only or more of them, it is in many cases necessary that the receipt for it be signed by all the trustees.^(a) "At law," says Lord Eldon, "where trustees join in a receipt, *prima facie* all are to be considered as having received the money. But it is competent to a trustee, and, if he means to exonerate himself from that interference, it is necessary for him, to shew, that the money, acknowledged to have been received by all, was in fact received by one, and the other joined only for conformity."^(b) When, therefore,

(t) *Farrington v. Knightly*, 1 P. W. 548, 549; *Rachfield v. Careless*, 2 P. W. 161; *Clare v. Almuty*, 2 Eq. Cas. Abr. 420; *Anon. Com.* 151.

(u) *Wind v. Jekyl*, 1 P. W. 575; *Sadler v. Hobbs*, 2 Bro. C. C. 114; *Scurfield v. Howes*, 3 Bro. C. C. 90, and *Belt's* ed. 95, where the judgment is reported from Lord Colchester's manuscript note; *Hovey v. Blakeman*, 4 Ves. 596, 607; *Chambers v. Minchin*, 7 Ves. 197; *Byrchall v. Bradford*, 6 Madd. 240, 241.

(v) *Mucklow v. Fuller, Jacob*, 198.

(w) 3 Atk. 584; 3 Swanst. 63.

(x) 3 Bro. C. C. 94; 7 Ves. 197; 11 Ves. 253, 254; 16 Ves. 479.

(y) 4 Ves. 596.

(z) *Scurfield v. Howes*, 3 Bro. C. C. 90; *Brice v. Stokes*, 11 Ves. 319; *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252, 16 Ves. 477.

(a) 1 P. W. 83; 2 Vern. 516; *Amb.* 219; 3 Atk. 584; 7 Ves. 198; 3 Swanst. 63; *Brice v. Stokes*, 11 Ves. 325.

(b) 11 Ves. 324.

one trustee receives the money, and it is shewn that a co-trustee received no part of it, but merely for the sake of conformity joined in signing the receipt, this co-trustee does not by such act render himself responsible for the due application of the money by him who received it.(c) And if each trustee receives a part, then, although they join in a receipt for the whole, each is answerable for that part only, which he himself received.(d) When, however, *after signing the receipt, it is [*541] the duty of him, who, from necessity or for conformity only, put his name to the receipt of the whole, to see the money received by his co-trustee duly applied, and this duty is neglected, and he knows that the fund is misapplied, in this case the trustee, who received no part of the money, or a share only of it, may be responsible for the money received by his co-trustee.(e)

Where there are several mere executors, and money is paid on account of the testator's estate, any one of the executors is empowered by law to receive it, and can sign a sufficient receipt for it.(f) And if another executor, by whom no part of the money is received, joins in signing the receipt, this concurrence is at law, it is said, an act which alone makes him responsible for the money;(g) on the ground, that such act is an unnecessary one, the receipt of him only, to whom the money is actually paid, being sufficient;(h) the joining in the receipt is taken to be conclusive evidence, that the money came to the hands of all the executors.(i) And the same doctrine appears to have formerly obtained in equity.(j) There, however, the rule is now altered; and the bare act of a mere executor joining in signing a receipt for money, paid to a co-executor, is not in equity enough to make him, who actually received no part of the money, answerable for it.(k)

When of the whole or a part of a testator's property executors are executors *in trust*; they being not only executors, but of a certain fund, and, for particular purposes, trustees also; then if *one of [*542] such executors receives money, and a co-executor joins in signing a receipt for it, the latter may, in some instances, become responsible for the due application of the money. A case of this kind seems to be *Scurfield v. Howes*. Here S. F., being entitled to 500*l.* secured

(c) *Townley v. Chalenor, or Sherborn*, Cro. Car. 312, Bridgm. 35, cited 2 Bro. C. C. 117, and 3 Bro. C. C. 94; *Heaton v. Marriot*, cited Prec. Ch. 173, 1 P. W. 82, and 2 Vern. 504; *Churchill v. Hopson*, 1 Salk. 318; *Attorney General v. Randall*, 21 Vin. Abr. 534, 2 Eq. Cas. Abr. 742; *Ex parte Belchier*, Amb. 218; *Westley v. Clarke*, 1 Eden, 359; *Leigh v. Barry*, 3 Atk. 584; *Sadler v. Hobbs*, 2 Bro. C. C. 117; *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 324. See *Spalding v. Shalmer*, 1 Vern. 303.

(d) *Fellows v. Mitchell, or Owen*, 1 P. W. 81, 2 Vern. 504, 515, 2 Freem. 283, 286.

(e) *Brice v. Stokes*, 11 Ves. 319.

(f) 1 Salk. 318; Amb. 219; 1 Atk. 460; 2 Ves. 267.

(g) 1 Salk. 318; 1 P. W. 243; Amb. 219; 1 Eden, 148; 2 Bro. C. C. 117.

(h) 1 Salk. 318; Amb. 219; 3 Atk. 584; 1 Eden, 360; 11 Ves. 325.

(i) 1 Eden, 147; 3 Bro. C. C. 95.

(j) Amb. 219; 3 Atk. 584; 2 Bro. C. C. 117; 7 Ves. 198. See *Aplyn v. Brewer*, Prec. Ch. 173.

(k) *Churchill v. Hobson, or Hopson*, 1 P. W. 241, 1 Salk. 318, cited 1 Eden, 147, and 2 Bro. C. C. 117; *Harden v. Parsons*, 1 Eden, 145; *Westley v. Clarke*, 1 Eden, 357, 1 P. W. 6th ed. 83 n., 1 Dick. 329, 2 Kenyon, part I, p. 541; cited 2 Bro. C. C. 117, 3 Bro. C. C. 94, 4 Ves. 608, 609, and 2 Sch. & Lef. 242; *Scurfield v. Howes*, 3 Bro. C. C. 94, 95; *Walker v. Symonds*, 3 Swanst. 64; *Joy v. Campbell*, 1 Sch. & Lef. 341, 3 Bligh P. C. (N. S.) 110, n.; *Doyle v. Blake*, 2 Sch. & Lef. 242, 243.

on mortgage, by will directed her executors to permit S. to take the interest for life; and if the mortgage should be paid off, she directed the money to be laid out in government securities, upon certain trusts; and appointed B. and H. executors. After the testatrix's death, the mortgage was paid off, and B. and H. joined in the re-conveyance, and in a receipt for the money; and it appears that H. alone received the money, and that B. did not receive any part of it. H. afterwards became insolvent. Sir R. P. Arden decided, that B. was answerable for the legacy, and decreed it to be paid out of his assets. And this decision he seems to rest on the circumstances,—that the money being paid to one of the executors, and the other joining in the receipt, both neglected to lay it out; that this neglect charged both, for leaving the fund in the hands that became insolvent, and on personal security, against their trust; and that, beyond the mere purpose of holding assets to pay debts, B. suffered his co-executor to retain the money for years, and to pay interest, when he ought to have laid it out. (l)

2. In *Gill v. The Attorney General*, this opinion is expressed by the Court of Exchequer;—"In the case of joint executors, none is chargeable for more than comes to his hands severally. But yet in that case, if by agreement amongst themselves one be to receive and intermeddle with such a part of the estate, and another with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made betwixt both." (m) And on this opinion delivered in *Gill v. The Attorney General*, Lord Thurlow has, in the Court of Chancery, stated, "The rule as laid down in that case, and adhered to in subsequent ones, remains the same as at law; and there is no authority [*543] in this Court to contradict it. For where one executor *takes the money but of his own authority, his companion shall not be charged; but if he puts the money into the hands of his companion, he shews he had it in his power to secure it; and that his companion, for some reason, was permitted to obtain the possession of the money." And his Lordship also said, "I take it to be clear, that where, by any act, or any agreement of the one party, money gets into the hands of his companion, whether a co-trustee or co-executor, they shall both be answerable." (n) In *Viner's Abridgment* it is said to have been held in Chancery in the case of *Serjeant Webb's will*, that, "if one trustee directs the payment of the trust-money over to the other, and joins in the deed, he charges and makes himself liable for the default of the other." (o) In *Sadler v. Hobbs*, W. S. by his will, gave the residue of his personal estate to *Reeve and Davies*, his executors, in trust for the plaintiff, an infant. At the testator's death, T. and Co. were indebted to him in 7000*l.* *Reeve*, the executor, was in partnership with *Devonshire*, as merchants. *Reeve and Davies*, as executors of S., drew two bills, or drafts, for 5000*l.* and 2000*l.* on T. and Co., payable to the house of *Devonshire and Reeve*; and these drafts were signed by both the executors. T. and Co. paid the 7000*l.* to *Devonshire and Reeve*,

(l) 3 Bro. C. C. 90; and ed. Belt, 95, & Lef. 341, and *Doyle v. Blake*, 2 Sch. & Lef. 231; and, farther, *Aplyn v. Brewer*, Prec. Ch. 173, cited 2 Bro. C. C. 117.

(m) Hardr. 314.

(o) 21 Vin. Abr. 534; 2 Eq. Cas. Abr.

(n) 2 Bro. C. C. 116. See also 1 Sch. 742, in marg.

who gave credit for it in their books to the estate of W. S. In 1766 Devonshire died; and in 1769 Davies died; and it appeared that Davies had never acted in the execution of S.'s will, (although he had proved it,) except by drawing the two bills on T. and Co. In 1773 Reeve became a bankrupt; the 7000*l.* having remained in his hands from 1766 to the time of the bankruptcy. On a bill filed, it was ordered that whatever appeared to have come to the hands of Davies should be answered by his executors. And the Master having charged the estate of Davies with one moiety of the 7000*l.*, the defendants excepted to the report. Lord Thurlow, however, held Davies to be answerable. And he appears to have so decided for these reasons,—that Davies joined in the act, the "signing of the drafts, by virtue of which the money [*544] came into the possession of Reeve; and that Davies "suffered [*544] the money to be out for a very long time in the hands of a tradesman, and neglected to call it in, notwithstanding the party interested in the fund was an infant."(*p*) In *Brice v. Stokes*, a settlement of real estate contained a power to trustees, M. and F., to sell. The trustees sold under the power, but without necessity. It did not appear for what purpose the sale was made, except for the mere purpose of converting real estate into personal. Both trustees joined in a receipt for the purchase-money; but it was paid to F. only. F. did not invest it pursuant to the trusts of the settlement, and died insolvent. Lord Eldon held M. to be answerable for the loss. And the reasons of this decision appear to be,—that the sale was made without necessity; that it was an act, that never could have been done by the mere exercise of the judgment of one of the trustees, enabling him to determine that it was necessary; that there was no necessity, in respect of which the other should join; and that after the receipt of the money by F., it was the duty of M. to take care, that F. did not retain the money beyond the time, during which the transaction required retainer; and that M., distinctly informed of F.'s misapplication of the money, neglected his duty to bring it back into their joint custody, pursuant to the trusts.(*q*) In *Bone v. Cook*, trustees under a will were held to be liable to make good the loss, which had been occasioned to the testatrix's estate, by their default, in allowing certain purchase-money of real estate to be received and retained by a co-trustee, who afterwards became a bankrupt.(*r*)

3.—It remains to notice the cases on responsibility occasioned by concurring in a sale of stock, or money in the public funds; which, when standing in the names of persons, who are trustees, or mere executors, or executors in trust, cannot, it has already *been mentioned, [*545] be transferred without the concurrence of all the executors [*545] or trustees.(*s*)

In *Murrell v. Cox*, the plaintiffs, as residuary legatees, brought their bill against the executors, C. and P., for an account. In a schedule to their answer, the executors made themselves jointly debtors for 200*l.*, East India stock. After the answer put in, the executors sold that stock, and divided the money, the one receiving 106*l.*, and the other the like

(*p*) 2 Bro. C. C. 114, cited 3 Bro. C. C. 94, and 4 Ves. 609.

(*r*) M'Clell. 168, 316 c.; 13 Price, 332

(*s*) 3 Bro. C. C. 94; 7 Ves. 197; 11

(*q*) 11 Ves. 319. See also *Bradwell v. Catchpole*, 3 Swanst. 78.

sum. C., after this, became insolvent; and P. insisted he ought to be charged only with 106*l.*, which was all he received. But it was decided, that P. was liable to pay the whole.(*t*)

In *Ex parte Shakeshaft*, K. and S., executors in trust, joined in selling out stock, and K. permitted S. to take it to his own use, upon giving an undertaking in writing to replace it upon demand. S. died insolvent, and K. became a bankrupt. And the parties beneficially interested in the trust-money were allowed to prove their debt under K.'s commission.(*u*) In *Chambers v. Minchin*, M. and G. were executors, and the will expressly made them trustees also. G. was induced by M. to execute a power of attorney, enabling the latter to sell out certain long annuities, part of the testatrix's estate. M. made the sale, and absconded insolvent. And, under the circumstances, Lord Eldon held G. to be answerable for the loss, so occasioned to the *cestui que trust*. This decision seems to be made chiefly on the grounds,—that G. was a trustee; that, in the transaction between him and M. relative to the sale, G. did not take common precaution; that he did not endeavour to learn what the purpose of the sale was, or that the power of attorney was to enable M. to execute a purpose connected with the due execution of the trust; and that it could not possibly be said, that G. did more than leave it to M. to do what he pleased with the property.(*v*) In *French v. Hobson*, executors in trust joined in a sale of stock, and lent the produce to one [*546] of themselves, and his partner in trade, upon their undertaking *to replace it. And these partners having failed, all the trustees were charged with the loss.(*w*) In *Lord Shipbrook v. Lord Hinchinbrook*, under a decree directing an account of the personal estate of A. M. L., the Master's report charged all the executors with 1200*l.*, 3*l.* per cent. reduced bank annuities, and interest, and one of them separately with 2819*l.* 5*s.* 10*d.* received by him. The defendants, three of the executors, took exceptions to the report for charging them with the 1200*l.*, and the interest; alleging, in their discharge, that they joined in executing a power of attorney to the fourth executor for the sale of that stock, upon his request, and representation that it was required for the purpose of paying debts; which stock he sold. He was permitted to manage the affairs of the estate; and, at the time of the sale, had in his hands the balance, with which he was charged separately. Lord Eldon held the three executors, who enabled the fourth to sell the stock, to be responsible. And the principal reasons for this decision seem to be,—that during two years and a half from the death of the testatrix, until the power to sell the stock was executed, the executor, who sold it, had been acting in the executorship, and, in doing so, trusted by the other executors; that the law supposes, that, in executing the duty of an executor, something is to be done in a year; and that these executors, entrusting their co-executor for two years and a half, ought, when asked to join in a sale of the stock, at least to have made some inquiry, what had been doing in the affairs; but, making no inquiry, were satisfied with the information, which proved groundless, that the applicant wanted the money for the purpose of paying debts; information which ought to

(*t*) 2 Vern. 570, 1 Eq. Cas. Abr. 247,
248, cited 1 P. W. 83, and 3 Bro. C. C. 94.
(*u*) 3 Bro. C. C. 197.

(*v*) 7 Ves. 186.
(*w*) 9 Ves. 103.

have led them to ask, how that could be. Lord Eldon considered the case to be one of executors, who, making no inquiry whatever, permitted their co-executor to do just what he pleased. His Lordship appears, however, to have made this distinction in their favour—to have charged them with the produce of the sale by their co-executor unapplied to the payment of debts, but not to have charged them with so much of such produce, as was so duly *applied by him.(x) The last-mentioned case has, under similar circumstances, been followed [*547] in *Underwood v. Stevens*.(y) In a recent case, *Hanbury v. Kirkland*, two trustees in a marriage settlement were decreed to re-invest certain stock, which by a letter of attorney they had empowered a co-trustee to sell out, on his representation that he had an opportunity of investing the property on mortgage; and which co-trustee applied the proceeds of the sale to his own use, and absconded. The decree was made on the grounds, that the co-trustees were guilty of most culpable negligence; omitting their duty to inquire what was the intended security, and who was to be the mortgagor; and, bestowing not a thought upon the subject, without farther inquiry, and without exercising a single act of discretion, executed the power of attorney.(z)

SECTION XV.

OF ADMISSION AND EVIDENCE OF ASSETS.

If an executor admits that he has assets in his hands, this admission is evidence against him, to prove that he either does now possess, or has possessed, assets.(a) And by means of the same admission and evidence, he may become personally liable to the payment of money; as to a creditor,(b) or legatee,(c) of his testator. It is, therefore, a matter of importance to ascertain some of the circumstances, that may have the effect to fix that admission upon him.

An admission, then, of assets may be fixed on an executor, amongst other means,(d)—by a letter written by him to a creditor [*548] of the testator, and wherein he mentions a sum of money as due on a mortgage to the testator:(e) by an inventory, which he has made of the testator's effects, and exhibited in the Spiritual Court:(f) as when an item in the inventory is, a debt due to the testator, and such debt is construed to be separate, because the executor does not, in the inventory, distinguish it as desperate:(g) by the stamp, which is affixed

(x) 11 Ves. 252, 16 Ves. 477.

(y) 1 Meriv. 712. See also *Brice v. Stokes*, 11 Ves. 312, 322, on responsibility for so much only of a trust fund, as is actually misapplied.

(z) 3 Sim. 265.

(a) 1 Ves. 75, 76.

(b) *Erving v. Peters*, 3 Durn. & E. 685.

(c) *The Corporation of Clergymen's Sons v. Swainson*, 1 Ves. 75; *Horsley v. Chaloner*, 2 Ves. 83.

(d) *Parker v. Atfield*, 1 Ld. Laym. 678,

1 Salk. 311, 12 Mod. 496, 527; *Hinton v. Parker*, 8 Mod. 169; *Horsley v. Chaloner*, 2 Ves. 83, *Belt's Supplem.* 280, 2d ed. 295; *Orr v. Kaines*, 2 Ves. 194; *Campbell v. Earl of Radnor*, 1 Bro. C. C. 271; *Ridout v. Bristow*, 1 Crompt. & Jerv. 231, 234, 1 Tyrwh. 84.

(e) *Robinson v. Bell*, 2 Vern. 146.

(f) *Hickey v. Hayter*, 1 Espin. 313, 6 Durn. & E. 384.

(g) *Shelley's case*, 1 Salk. 296; *Young v. Cawdrey*, or *Cordery*, 8 Taunt. 724, 3 J. B.

to the probate of the will: *(h)* by, if the testator is indebted by simple contract, the executor's giving his bond for the debt: *(i)* by, in some cases, the executor's paying interest on a debt owing by the testator, *(j)* or on a legacy bequeathed by him: *(k)* by the executor's owing that, to pay a legacy, money lies ready for the legatee, whenever he will call for it: *(l)* by promising to pay a legacy: *(m)* by, in some cases, a submission to arbitration: *(n)* by, in an action against him, omitting to plead a deficiency of assets; as if he confesses judgment, or suffers judgment by default, or if, supposing he pleads, he does not, by a plea *plene administravit*, or other plea, deny assets: *(o)* by his answer to a bill filed in equity against him. *(p)*

[*549] *Parsons v. Hancock was an action of debt against executors, who all pleaded that they had fully administered. The plaintiff produced, as evidence of assets, an inventory of the goods of the deceased, signed by two of the three defendants, as executors. The three defendants had proved the will. By Parke, J.—“I think the defendant, who did not sign the inventory, is entitled to a verdict. The substance of the plea, as far as she is concerned, is, that she administered all that ever came to her hands for that purpose; and there is no evidence that any ever did so. I think the plaintiff can only have his verdict against the two, who signed the inventory.” *(g)*

In Williams v. Innes, which was an action against executors on a covenant by their testator, the defendants pleaded that they had fully administered. To prove assets in their hands, an account rendered by them to the plaintiff was given in evidence, in which they stated that 1000*l.* had been awarded, as due to the testator's estate from a person, who had been jointly concerned with him in underwriting policies of insurance. Lord Ellenborough held this not to be sufficient proof of assets, as it did not shew that any part of the sum awarded had been received by the executors. A letter from the defendants to the plaintiff was then put in, stating to her, that if she wanted any farther information concerning the affairs of the deceased, she should apply to a Mr. R.,

Moore, 66. On separate debts, see Chapter VIII. Section I. of the present Treatise.

(h) Foster v. Blakelock, 5 Barn. & C. 328, 8 Dowl. & Ry. 48; Hancock v. Podmore, 1 Barn. & Adol. 260; Curtis v. Hunt, 1 Carr. & P. 180.

(i) Maytin v. Hoper, Ridgew. Cas. T. Hardw. 206, 209.

(j) Robinson v. Savile, Sel. Ca. Ch. 61; Cleverly v. Breet, stated 5 Durn. & E. 8.—Lofft, 68, 69; 2 Ves. 85.

(k) Campbell's case, Lofft, 68; The Corporation of Clergymen's Sons v. Swainson, 1 Ves. 75.—2 Ves. 85.

(l) Camden v. Turner, cited Cowp. 293.

(m) Bothe v. Crampton, Cro. Jac. 613.

(n) Barry v. Rush, 1 Durn. & E. 691; Worthington v. Barlow, 7 Durn. & E. 453; Robson v. Anon., 2 Rose, 50. See also Section XII. of the present Chapter.

(o) Legate v. Pinchion, Cro. Jac. 294, 9 Co. 86 b.; Treil v. Edwards, 6 Mod. 306; Rock v. Layton, or Leighton, 1 Ld. Raym.

589, 1 Salk. 310, Com. 87; Rook v. Sheriff of Salisbury, perhaps S. C., 12 Mod. 411; Ramsden v. Jackson, 1 Atk. 292; Skelton v. Hawling, 1 Wils. 258; Erving v. Peters, 3 Durn. & E. 685; Kilbee v. Gore, 1 Vern. & Scriv. 230. See also Cro. Eliz. 102, and 4 Durn. & E. 637; and, farther, Chapter XXV. of the present Treatise.

(p) Cook v. Martyn, 2 Atk. 2; Cooper v. Martin, S. C., 1 West Cas. T. Hardw. 442; Orr v. Kaines, 2 Ves. 194; Roberts v. Roberts, 2 Dick. 573, also stated 1 Bro. C. C. 487; Wall v. Bushby, 1 Bro. C. C. 484; Foster v. Foster, 2 Bro. C. C. 616; Dagley v. Crump, 1 Dick. 35, 2 Bro. C. C. 610 n.; Tew v. Lord Winterton, cited 4 Ves. 606; Pullen v. Smith, 5 Ves. 21; Johnson v. Aston, 1 Sim. & St. 73; M'Williams' case, 1 Sch. & Lef. 169. See also Norton v. Turvill, 2 P. W. 144, and Freeman v. Fairlie, 3 Meriv. 29. See, likewise, 3 Swanst. 548.

(g) 1 Moody & Malk. 330. See Bellow v. Juckleden, 1 Rol. Abr. 929, B. pl. 5.

a merchant in the city. It was next proposed to adduce the plaintiff's attorney, to prove that, by her desire, he had called upon Mr. R., who informed him that the whole of the 1000*l.* had actually been received by the defendants. The counsel for the defendants objected to the admissibility of this evidence, as not being the best, which the nature of the case admitted of, and contended that R. himself should be called: but by Lord Ellenborough,—“If a man refers another upon any particular business to a third person, he is bound by what this third person says or *does concerning it, as much as if that had been said or done by himself.” Upon the recommendation of the Chief Jus- [*550] tice, the cause was afterwards compromised.(*r*) In *Hindsley v. Russell*, which was an action against an executor on a promissory note given by the testator, the defendant pleaded *plene administravit*. At the trial before Lawrence, J., the evidence, as to this plea, was, that the defendant admitted that the debt was just, and should be paid as soon as he could. But the learned Judge having great doubt, whether this admission were evidence of assets on that plea, though he suffered the plaintiff to take a verdict, gave leave to the defendant to move the Court to set it aside. And on this motion being made, “The Court were satisfied that the admission proved was not evidence to charge the defendant with assets. They said that his admission must be taken with a reasonable intentment; for he could not mean to pledge himself to commit a devastavit, by paying this debt before others of a higher nature.”(*s*)

SECTION XVI.

OF PAYING DEBTS BEFORE LEGACIES.

In general cases, it is the duty of an executor to discharge, out of legal personal assets,(*t*) the debts owing by his testator, before he pays any legacy given by his will; a duty which he is bound, both at law(*u*) and in equity,(*v*) to observe; and if he *neglects such duty, and first pays a legacy before a debt, and there is afterwards an [*551] insufficiency of assets to satisfy the debt, then, in many instances, he may be personally responsible to the creditor, and obliged to pay the debt out of his own pocket;(w) for it is a devastavit, a wasting of the assets, to pay, or assent to, legacies before payment of debts.(*x*)

(*r*) 1 Campb. 364.

(*s*) 12 East, 232.

(*t*) On paying debts before legacies, when, by a will, real estate is devised in trust for, or charged with, the payment of debts and legacies, see *Hixon*, or *Hickson*, v. *Wytham*, 1 Ch. Cas. 248, Cas. T. Finch, 195, 1 Freem. 305; *Whitton v. Lloyd*, 1 Ch. Cas. 275; *Poly's case*, 2 Freem. 49, 2 Eq. Cas. Abr. 459; *Herbert v. Herbert*, 2 Freem. 270, Ca. 339; *Wollstencroft v. Long*, 3 Ch. Rep. 12, 1 Ch. Cas. 32, 2 Freem. 175; *Gosling v. Dorney*, 1 Vern. 482; *Anon.* 2 Vern. 133; *Greaves v. Powell*, ib. 248, 302; *Anon.* ib. 405; *Powell's case*, *Nela*. 202; *Bradgate v.*

Ridlington, Mos. 56; *Walker v. Meager*, 2 P. W. 550, Mos. 204; *Lloyd v. Williams*, 2 Atk. 111; *Maytin v. Hoper*, *Ridgew.* Cas. T. Hardw. 206, 209; *Kidney v. Cousemaker*, 12 Ves. 154.

(*u*) 9 Co. 90, b.; 1 Rol. Abr. 927, U. pl. 2, 5; *Wentw. Off. Ex. Ch.* 19.

(*v*) *Anon.* 2 Freem. 134, Ca. 163, b.; *Anon.* ib. 137, Ca. 169.—3 Meriv. 38.

(*w*) *Doct. & St. Dial.* 2, Ch. 10, ed. 1709, p. 158; *Bro. Abr. tit. Administrators*, pl. 37, tit. *Executors*, pl. 116; *Swinb.* part 3, a. 16; *God. Orph. Leg.* part 2, ch. 26.

(*x*) *Doct. & St. Dial.* 2, Ch. 10; *Swinb.* part 3, a. 16; *Wentw. Off. Ex. Ch.* 13; *God.*

The following cases occur on an executor's paying a legacy, or residue, while there exists a contract, bond, or covenant, by which, on a contingency, the testator may become indebted.(y)

Curtis v. Hunt was an action of covenant against the executors of a lessee, for not repairing. The defendants having pleaded *plene administraverunt*, the probate of the lessee's will was produced, dated, 27 May, 1796, and by which it appeared his property was sworn under 5000*l.*; and, on a reference to the Stamp Act of that time, it was shewn that the next lowest sum was 2000*l.*, that is, that the probate duty was paid for a sum between 2000*l.* and 5000*l.* The premises in question were bequeathed by the lessee's will, and the legatee had been let into possession. The plaintiff obtained a verdict; Abbott, C. J., saying,—“The executors might have taken an indemnity from the legatee. Here is *prima facie* evidence of assets to the amount of 2000*l.*, in the duty paid upon the probate. The executors also might have kept the premises, to answer the expenses of repairs. It is unfortunate for the executors; but the lessor must not suffer, because they neglected to do what they might have done.”(z) In *Chelsea Water-works' Company v. Cowper*, an action of debt was in 1795 brought upon bond against the defendant, [*552] as executor of *Sir G. L. In 1768 Sir G. L., having procured for B. the place of collector under the company, had joined in the present bond as a surety for the faithful accounting and paying over to the company of the sums collected by B. in the course of his duty. Upon the issue of *plene administravit*, the defendant's counsel admitted that the defendant had assets from Sir G. L. sufficient to satisfy the debt; but stated, that twenty-two years ago he had paid over the whole of Sir G. L.'s property, which he had then in his hands, to the Duke of B., as residuary legatee; and that he had now nothing remaining in his hands, nor had he, till the bringing of the present action, any notice that there was such a claim, as that now made, subsisting against the estate. Lord Kenyon said, that “he was of opinion, that where an executor or administrator has satisfied the debts and legacies affecting the testator's or intestate's estate, and paid over the remainder to the residuary legatee; and has had no notice of any other subsisting demand, provided he had not done it too precipitately, that it was a good answer to an action, such as the present; that the statute,(a) having directed that no legacies should be claimed before the end of one year from the testator's death, seemed to have meant to give that time for creditors to the estate to make their claims, or at least to give notice to the executor or administrator that there were such claims subsisting; and that, as in the present case, the debt was of such long standing, and unclaimed for such a number of years, and the remainder of the estate paid over to the residuary legatee, he was of opinion that it was complete evidence of *plene administravit* in favour of the executor; but his

Orph. Leg. part 2, ch. 26; 1 Peake Rep. 152, 3d ed. 204.

(y) On this subject, see also *Harrison's case*, 5 Co. 28 b.; *Eeles v. Lambert*, Style, 37, 54, 73, Aleyn, 38; *Necton and Sharpe v. Gennet*, Cro. Eliz. 466, 1 Rol. Abr. 928, X. pl. 1, 2, Mo. 413; *Hawkins v. Day*, Amb. 160, ed. Blunt, Append. 803, 1 Dick. 155, 3

Mer. 555, n.; and *Graham v. Keble*, 2 Bligh P. C. (1 Ser.) 126. See, likewise, 3 Salk. 125, tit. *Devastavit*, pl. 2.

(z) 1 Carr. & P. 180.

(a) See the Statute of Distribution of Intestates' Estates, 23 and 23 Ch. II. c. 10, s. 8, and 1 Salk. 415.

Lordship added, he would reserve that point.”(b) In *Simmons v. Bolland*, the mayor and commonalty of C., in 1798, leased to S. for thirty years, at a certain rent, and under covenants for payment of rent and taxes, and for repairs, &c. The lessee by his will gave all his real estates, and all his leaseholds and personal estate, to the defendant B. and another (whom he also appointed his executors,) upon trust to sell; and, after payment thereof of “debts and legacies, to invest the [*553] produce in their names upon certain trusts; subject to which he gave the entire residue of his estate to the plaintiff, on his attainment of the age of twenty-five years. The testator died in 1807, leaving the plaintiff, his son, then a minor. The trustees and executors proved the will, possessed themselves of the whole of the testator’s estate, real and personal, and paid the debts and legacies, without resorting to a sale of the real estate, or of the leaseholds, into the possession of which (including the premises demised by the lease to S.) the plaintiff, on his attaining twenty-five, entered; at which time, also, the entire residue of the personal estate was transferred to him by the executors, except a bond for 1000*l.* from the mayor and commonalty of C. to the testator, and a sum of 800*l.* five per cents., which were still retained by them out of the surplus, and for the recovery of which the present bill was filed. To this bill the defendant, the surviving trustee and executor, by his answer submitted that he was entitled to retain the property in question, “for the purpose of protecting himself from any claim which might be made against him as devisee in trust and executor of S., in respect of rent due, or thereafter to accrue due, for the premises demised by the said indenture, or of the present or any future breach or non-performance of any of the covenants therein contained; the payment of which rent, and performance of which covenants, the defendant was advised he was liable to under the said indenture;” and had actually then lately received a notice to that effect from the corporation. He at the same time admitted, that there were then no subsisting breaches of covenant, in respect of which he was so liable, and that no rent was then due or in arrear for the premises; but insisted that, under the circumstances, he was entitled to retain as aforesaid, in respect of any future contingent demands, to which the notice given by the corporation also extended. By Sir W. Grant:—“The equitable relief sought in this case depends upon a legal question,—whether an executor can safely make payment of legacies, or deliver over a residue, while there is an outstanding covenant of his testator, which has not yet been, and never may be, “broken.” [*554] And, after commenting on *Eeles v. Lambert*,(c) *Necton v. Gennet*,(d) and *Hawkins v. Day*,(e) his Honour continued,—“In this state of the authorities, it would be too much for me to order the executor to transfer and pay, without having security given him, in case of judgment being recovered against him at law, for any future breach of the covenant. No decree, that I can make, will bind the corporation of C., or protect the executor against their demand, if the bond should hereafter be forfeited. All that I can do is, to order the funds to be made over, on the plaintiff giving a sufficient indemnity; and it must be

(b) 1 Espin. 275.

(c) Style, 37, 54, 73; Aleyn, 38.

(d) Cro. Eliz. 466; 1 Rol. Abr. 928, Mo. 413.

(e) Amb. 160.

referred to the Master to settle the terms of such security.”(f) In *Vernon v. Earl of Egmont*, the respondent, being residuary legatee under the will of his father, filed a bill in equity against the appellant, the executor, for payment. By the Master’s report, it appeared that certain estates stood limited to the use of the testator for life, remainder to such uses as the testator and the respondent should jointly appoint; and, in default thereof, to such uses as the respondent should appoint; and, in default thereof, to the use of the respondent for life, remainder to the use of his first son in tail male, with remainders over; and with powers to the testator to lease for twenty-one years, reserving the best yearly rent, without taking any fine. The testator executed many leases, which contained covenants on his part for quiet possession; but such leases were not in conformity with his powers of leasing, inasmuch as they were for longer terms, and that some of the tenants paid fines for the granting of their leases. On the ground that the tenants, if evicted, might sustain an action against the appellant, he objected to paying over the residue, without indemnity from the respondent; and the Master of the Rolls having decreed payment, without that indemnity, such decree was reversed by the House of Lords. “Lord E.,” it was observed by Lord Eldon, “has the power to dispute or to confirm the leases: may he not be required, before he receives the assets, to confirm the leases? If [*555] *a creditor, having a present debt, omits to claim it under the decree, he may be excluded. But this is the case of creditors, who are not qualified to claim—even upon ejectment, not till after judgment. A residuary legatee, having the power to disturb leases made by the testator, should confirm, or undertake not to disturb, them, before he takes the assets. Some security is necessary, notwithstanding all the inconvenience attending that course of proceeding.” On another occasion Lord Eldon said, that “if it were necessary to decide the general principle, although he was inclined to think that the appellant had a title, he should take much time for consideration: but that the case was special, as the respondent had the power to confirm, or to disturb, the leases, and that he ought not to take the funds out of the hands of the executor, without giving indemnity against any action, which might be brought by the tenants in case of eviction, on which special ground he should advise the House to reverse the decree.” The declaration of the Lords was, “that before the residue of the testator’s personal estate shall be paid to the respondent, the Earl of E., or his assigns, the said Earl of E. ought either to confirm, or, in case he is unable to confirm by his own act, to procure to be confirmed, the said leases granted by the said testator not in conformity with his powers, or otherwise give a satisfactory indemnity to the appellant against any claims, which might be made against him in respect of the said leases, and all costs, charges, damages, and expenses, which the appellant might incur, or be subjected to, in respect thereof.”(g) *Dando v. Dando* (a case, which it may not be improper to insert in this place,) was a suit instituted to carry into effect the will of a testator, who died in 1817, having bequeathed his personal estate to trustees, in trust to convert it into money, to lay out the proceeds on government or real securities, and to pay the income to the plaintiff, his widow, for life. The executor admitted, in his answer, that all the testator’s debts

(f) 3 Meriv. 547.

(g) 1 Bligh P. C. (N. S.) 554.

and funeral expenses had been paid; and a balance, which he had paid in under an order of the Court, had been laid out. For the plaintiff it was moved, *that the dividends then accrued due, and there- [*556] after to accrue due, on the stock purchased with the balance, might be paid to her. Sir A. Hart said,—“If an executor admits assets, he does it at his peril; and therefore I shall make the order as prayed.”(h)

SECTION XVII.

OF INSTANCES, WHERE AN EXECUTOR'S PERSONAL LIABILITY IS NOT INCURRED.

AMONG other acts which may not be a devastavit or that may not draw on an executor personal liability or loss,(i) it appears that, by the decision of, or opinion expressed in, a Court of law, at law a devastavit may not be committed,—and the executor's personal liability or loss may not be incurred,—by paying debts by simple contract before a bond debt of which the executor has not notice:(j) by paying a debt now due on bond, in disregard of a statute or recognizance to perform covenants not yet broken,*or defeazanced for payment of money at a day yet [*557] to come:(k) by an act, which is a devastavit in a co-executor only:(l) or by preferring, Lord Hardwicke seems to have thought, the

(h) 1 Sim. 510.

(i) *Bereblock v. Read*, or *Rede v. Bereblock*, Cro. Eliz. 734, 822, 2 Brownl. & G. 81, Yelv. 29, 4 Co. 59, b.; *Anon.* 2 Anders. 157; *Anon.* Keilw. 51, a., Ca. 5; *Eveling v. Leveson*, Gouldsb. 115; *Britton v. Bathurst*, 3 Lev. 113, cited Amb., ed. Blunt, Append. 805.—*Gouldsb.* 181, 3 Salk. 125, tit. *Devastavit*, pl. 3. If *Britton v. Bathurst* is understood, one point decided in it appears to be, that if an executor confesses judgment to a creditor by simple contract, and afterwards discovers a bond creditor, whom he pays, then, as at the time of confession of the judgment the executor had not notice of the bond, the payment of such bond debt before satisfaction of the judgment is not a devastavit.

(j) *Vaugh.* 94; *Fitz-Gib.* 78; *Britton v. Bathurst*, 3 Lev. 115, cited Amb., ed. Blunt, Append. 805; *Brooking v. Jennings*, 1 Mod. 175; *Harman v. Harman*, 3 Mod. 115, 2 Show. 492. See the last-mentioned case in *Comberb.* 35; and see also 1 *Barnard. Rep.* 186. In *Brooking v. Jennings*, *Vaughan, C. J.*, expressed an opinion, in which *Aikyns, J.*, and *Ellis, J.*, agreed, that “debts upon simple contracts may be paid before bonds, unless the executors have timely notice given them of those bonds; and that notice must be by *action*.” 1 Mod. 175. This opinion appears to be opposed by the nume-

rous authorities, which affirm, in general terms, that at law debts by bond are payable before debts by simple contract. 9 Co. 88, b.; Cro. Eliz. 316; 7 Barn. & C. 452. And notwithstanding the considerable opinion referred to, it is believed that, to affect an executor by notice of a bond, it needs not to be by action, and that many kinds of notice will be sufficient for the purpose. 3 Lev. 115; Amb. 162, and, ed. Blunt, Append. 805; 1 Dick. 157. On the other hand, creditors need not demand but by an action, 7 Ves. 193; and it is the business of the executor to find out the creditors. 7 Ves. 193; *Wentw. Off. Ex. Ch.* 13, 14th ed. p. 305. When, therefore, an executor pays simple contract debts, he must, to avoid personal responsibility, take care both that he is not possessed of any notice of bond debts, and that he pays the simple contract creditors “in a reasonable way,” 1 Dick. 157, and is not guilty of laches, or neglect of duty, in his search after creditors by bond. *Ibid.* *Wentw. Off. Ex. Ch.* 13, 14th ed. p. 304, 305.

(k) *Anon.* Mo. 752, *Jenk. Cent. C.* 6, Ca. 94; *Harrison's case*, 5 Co. 28 b.; *Phillips v. Echard*, Cro. Jac. 8, 35.

(l) *Hargthorpe v. Milforth*, Cro. Eliz. 318.—1 Dick. 157; *Wentw. Off. Ex. ch.* 13, 14th ed. p. 306. See *Champneys v. Browne*. 1 Barnes. 323.

debt of a subject to a debt due to the king, in case the king's debt is not upon record.(m)

And, among other instances.(n) it may be mentioned, that it appears that, by the decision of, or opinion expressed in, a Court of Equity, in equity a devastavit may not be committed, and the executor's personal liability may not be incurred—by paying debts by simple contract before a debt by bond, of which the executor has not notice: or by paying debts by simple contract *before* a breach of the condition of a bond to perform covenants, and of which bond the executor has *not* notice: or by paying debts by simple contract *after* a breach of the condition of a bond to perform covenants, and of which bond the executor has *not* notice: or by paying debts by simple contract *before* a breach of the condition of a bond to perform covenants, and of which bond the executor *has* notice.(o)

SECTION XVIII.

OF A CLAUSE OF INDEMNITY IN A WILL.

A WILL frequently contains a declaration purporting to be an indemnity to the executors or trustees named in the will, against *losses that may happen to the trust estate. And it appears that where a clause of this kind is omitted in a will, it is taken to be implied in, or is infused into, by the Court of Chancery.(p) And it may perhaps be considered, that executors or trustees are not more indemnified by the usual express clause of indemnity, than they are by the Courts of Equity, although this clause is wholly left out of the will.(q) Where there is not fraud or a breach of trust, trustees and executors appear to be in every case anxiously protected by the Courts of Equity.(r) Generally speaking, the express declaration of indemnity contained in a will is not meant to be a defence against an act, which, in the consideration of a Court of Equity, amounts to fraud or a breach of trust.(s) And it is certain that executors or trustees may, in many cases, be responsible for a loss occasioned to the estate entrusted to them, notwithstanding a clause of indemnity inserted in the will.(t) Responsibility

(m) *Otway v. Ramsay*, 4 Barn. & C. 416, n. See, however, *Parker Rep.* 101.

(n) *Gibbs v. Herring*, Prec. Ch. 49; *Blue v. Marshall*, 3 P. W. 381; *Orr v. Newton*, 2 Cox, 274; *Langford v. Gascoyne*, 11 Ves. 333, 336, as to the executor *Lambert*; *Turner v. Turner*, 1 Jac. & W. 39, 44.

(o) *Hawkins v. Day*, Amb. 160, and, ed. Blunt, Append. 803, 1 Dick. 155, 3 Meriv. 555, n. This case contradicts *Greenwood v. Brudnish*, Prec. Ch. 534.

(p) 18 Ves. 254; 2 Atk. 126.

(q) 2 Atk. 126; 3 Atk. 444, 584; Amb. 219; 1 Dick. 126; 8 Ves. 8; 18 Ves. 254.

(r) *Crookshanks v. Turner*, 7 Bro. P. C. ed. Toml. 255; *Allen v. Hancorn*, ib. 375; *Blue v. Marshall*, 3 P. W. 381; *Anon.* 12 Mod. 560; *Jackson v. Jackson*, 1 Atk. 513,

1 West Cas. T. Hardw. 31; *Bruere v. Pemberton*, 12 Ves. 386; *Birls v. Betty*, 6 Madd. 90.—1 P. W. 141; 5 Ves. 843; 11 Ves. 107; 13 Ves. 410, 412; 3 Meriv. 42.

(s) *Hide v. Haywood*, 2 Atk. 126; *Mucklow v. Fuller*, Jacob, 198. As against creditors, a clause could not, it is presumed, be framed, effectual to protect against a breach of trust; although as against volunteers, as legatees in the will, it is probable such a declaration of indemnity would be permitted to have the force intended. 1 Salk. 318; 1 P. W. 243; 1 Eden, 380; 2 Sch. & Lef. 239, 240, 245. See 2 Bro. C. C. 117.

(t) *Sadler v. Hobbs*, 2 Bro. C. C. 114; *Mucklow v. Fuller*, Jacob, 198; *Bone v. Cook*, M'Clel. 168, 13 Price, 332.

for losses has accordingly been incurred,—in the instance of a loan of trust-money, although the will declared that the trustees “should not be answerable for any loss which might happen, without their wilful neglect or default:”(u) and in the instance of concurring in a sale, joining in a receipt for the purchase-money, and permitting a co-trustee to retain the money; although the instrument, which created the trust, declared that the trustees “should not be chargeable with, or accountable for, any more of the trust-monies, than he or they *should actually [*559] receive, nor with or for any loss which should happen of the same monies, or any part thereof; so as such loss happened without his or their wilful default; nor the one for the other of them, but each of them only for his own acts, deeds, receipts, disbursements, and defaults:”(v) and in the instance of allowing certain purchase-money to be received and retained by a co-trustee; and of a loss occasioned by trustees, through their omission to re-invest certain stock immediately, which had been sold, and the produce for some time placed in the hands of their bankers; notwithstanding the will contained a proviso, that “the trustee or trustees should not be answerable or accountable for any trust-money, further than each person for what he should actually receive, and not the one for the other or others of them, or for the acts, receipts, or defaults of the other or others of them; but each person for his own acts, receipts, and defaults only; and not for any involuntary loss whatsoever:”(w) and in instances of joining in a sale of stock, although the will declared, in one case, that the executors and trustees “should be indemnified from all costs and charges in and about the execution of the will;”(x) and, in another case, that “the trustees and executors respectively should be answerable only for such monies as they should respectively receive, and should not be answerable or accountable for the acts, receipts, or defaults of each other, or for any loss, misfortune, or damage, which might happen in the execution of the will, except the same should happen through their wilful default respectively.”(y)

*CHAPTER XXXIX.

[*560]

OF INTEREST ON DEBTS.

SECT. I. *Of Allowing Interest in a Court of Law.*II. *Of Allowing Interest in a Court of Equity.*

SECTION I.

OF ALLOWING INTEREST IN A COURT OF LAW.(a)

At law, interest is payable on a debt, in cases where there is a con-

(u) *Langston v. Ollivant, Cooper*, 33.(x) *Chambers v. Minchin*, 7 Ves. 186.(v) *Brice v. Stokes*, 11 Ves. 319.(y) *Underwood v. Stevens*, 1 Meriv. 712.(w) *Bone v. Cook, M'Clel.* 168, 316, c., 13 Price, 332.(a) Generally on this subject, see, besides the authorities after referred to, *Orr v. Church-*

tract, express or implied, to pay interest.(b) Also, under especial circumstances, interest is, in the shape of damages, allowed by a Court of Law, when a debt is detained from the creditor.(c)

An agreement to pay interest may be implied in a contract, from the nature of the security given to pay the debt;(d) or from the usage of the trade, to which the contract relates;(e) or from some dealings between the debtor and creditor.(f) If the security given is a bill of exchange, [*561] then, because it is the usage of trade "to pay interest on this mercantile security, a contract to pay interest is implied from that usage.(g)

Except under particular circumstances,(h) a bill of exchange carries interest from the time when it becomes due.(i) And when, in a promissory note, the promise is to pay the debt on a day certain, the note carries interest from that day.(j) And when, in such a note, the promise is to pay the debt on demand, it appears the note carries interest from the time of the demand made.(k)

If, in a bill of exchange, or promissory note, it is expressed that the bill or note is to carry interest, then, after the principal money is due, the interest is a part of the debt.(l) But when interest is payable on a bill of exchange, or promissory note, which does not mention interest, in this case the interest is not a part of the debt.(m) It is only damages for the detention of the debt.(n) To give these damages it is the province of a jury;(o) but the creditor is not, it appears, subject to their caprice,(p) and is entitled to their verdict for interest as damages,(q) except in a peculiar or extraordinary case, where such interest may be properly withheld.(r) "Although by the usages of trade," it is observed by Bayley, [*562] J., "interest is allowed on a bill, yet it *constitutes no part of the debt, but is in the nature of damages, which must go

11, 1 Hen. Bl. 227; *Trelawney v. Thomas*, ib. 303; *Dixon v. Parkes*, 1 Espin. 110; *Shipley v. Hammond*, 5 Espin. 114; *Kington v. McIntosh*, 1 Campb. 618; *Beecher v. Jones*, 2 Campb. 428, n.; *Dawes v. Pinner*, ib. 466, n.; *Gantt v. Mackenzie*, 3 Campb. 61; *Harrison v. Dickson*, ib. 52, n.; *Dent v. Dunn*, ib. 296; *Hellier v. Franklin*, 1 Stark. 291; *Moore v. Voughton*, ib. 487.

(b) 15 East, 229; 2 Barn. & C. 349.

(c) *Hilhouse v. Davis*, 1 M. & Sel. 169; *Arnott v. Redfern*, 3 Bing. 353, cited 4 Man. & Ryl. 809.—3 Camb. 297; 7 Taunt. 595; 8 Taunt. 54, 55. See also *Sweatland v. Squire*, 2 Salk. 623.

(d) 3 Bing. 359; 2 Barn. & C. 349, 351; 9 Barn. & C. 381.

(e) *Doug.* 361, 4th ed. 376; 3 Bing. 359; 2 Barn. & C. 349, 351; 4 Barn. & C. 723, 730; 9 Barn. & C. 381.

(f) 4 Barn. & C. 723, 730.

(g) 2 Barn. & C. 351; 9 Barn. & C. 381.

(h) *Murray v. East India Company*, 5 Barn. & Ald. 204.

(i) 2 W. Bl. 761; 8 Taunt. 249; 2 Dow & Clark, 299. See 6 Mod. 138.

(j) 2 W. Bl. 761; 3 Wils. 206; 8 Taunt.

249; 5 Ves. 803; 17 Ves. 28, 29; *Laing v. Stone*, 2 Mann. & Ryl. 561.

(k) *Upton v. Lord Ferrers*, 5 Ves. 801, 803; *Hacknott v. Webber*, stated in *Adams v. Gale*, 2 Atk. 106.—2 W. Bl. 761; 17 Ves. 28, 29. See 6 Mod. 138.

(l) 2 Barn. & Ald. 309; 2 Barn. & C. 352. See also 1 Atk. 151, and 2 Barn. & Ald. 307, 308.

(m) 2 Barn. & Ald. 308, 309; 1 Dowl. & Ryl. 19; 2 Mann. & Ryl. 562. See 2 Barn. & C. 352. As the interest is not a part of the debt, it cannot be added to the principal, so as to make a good petitioning creditor's debt, on which to ground a commission of bankruptcy. *Burgess's case*, 8 Taunt. 660. *Cameron v. Smith*, 2 Barn. & Ald. 305.

(n) 1 Atk. 151; 2 Barn. & Ald. 307, 308, 309; 1 Dowl. & Ryl. 17, 19, 20; 5 Ves. 803; 1 Rose, 401, 402.

(o) 1 Dowl. & Ryl. 17, 19; 2 Barn. & Ald. 308.

(p) 2 Mann. & Ryl. 562, 563.

(q) *Laing v. Stone*, 2 Mann. & Ryl. 561.—3 Ves. 134, 135.

(r) *Du Belloix v. Lord Waterpark*, 1 Dowl. & Ryl. 16.—2 Barn. & Ald. 308; 2 Mann. & Ryl. 563.

to the jury, in order that they may find the amount; and it is competent for them either to allow five per cent., or four per cent., according to their judgment of the value of money, or they may even allow nothing, in case they are of opinion that the delay of payment has been occasioned by the default of the holder."(*s*)

A general rule is now firmly established, that, in a Court of Law, interest is not allowed on a debt, as a book-debt, (*t*) or shop-debt, (*u*) or money lent, (*v*) or money owing for goods sold, (*w*) or money sued for by an action for money had and received, (*x*) unless it is payable by a contract express, or that may be implied from some cause, as the usage of trade, or the dealings between the parties. (*y*) This general rule is fully expressed in the following opinions, delivered on the Bench:—"It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade, or other circumstances." (*z*) "The general rule is, that interest is not due by law for money lent; unless, from the usage of trade, or the dealings between the parties, a contract for interest is to be implied." (*a*) "It is clearly established by the later authorities, that, unless interest be payable by the consent of the parties, express, or implied *from the usage of trade (as in the case of bills of [*563] exchange,) or other circumstances, it is not due by common law." (*b*)

Under the general rule mentioned, a debt may not carry interest, although it is contracted in writing, and this contract makes it payable at a day certain, as at six months; (*c*) or is secured by a deed, as a single bond, which does not mention the time of payment, (*d*) or which does mention it, and makes the debt payable at a day certain, namely, by instalments, at three, five, and seven months from the date; (*e*) or is secured by a deed of covenant, under which the debt becomes payable at a day certain; (*f*) or although the debt is rent, which is reserved payable on a day certain. (*g*)

It has been mentioned, (*h*) that, under especial circumstances, a Court of Law allows interest, when a debt is detained from the creditor. But with respect to allowing interest by reason of detention, there appears to be a difference of opinion, which makes it difficult to collect any definite rule on the subject. Lord Mansfield has held, "that though, by the common law, book-debts do not of course carry interest, it may be payable

(*s*) 2 Barn. & Ald. 308.

(*t*) Doug. 361, 4th ed. 376; 15 East, 227; 1 Campb. 51, 519.

(*u*) 3 Ves. 135.

(*v*) *Calton v. Bragg*, 15 East, 223; *Shaw v. Picton*, 4 Barn. & C. 715, 723.—3 Campb. 259; 2 Barn. & C. 350, 351; 9 Barn. & C. 380; 4 Mann. and Ryl. 307.

(*w*) *Vernon v. Cholmondeley*, Bunb. 119; *Pinock v. Willett*, Barnes, 3rd ed. 228; *Gordon v. Swan*, 12 East, 419.—2 W. Bl. 761; 3 Wils. 206; 13 East, 99; 15 East, 227, 229; 7 Taunt. 595; 1 Campb. 51; 2 Campb. 473. See *Mountford v. Willes*, 2 Bos. and P. 337, cited 2 Campb. 430, n.

(*x*) *Walker v. Constable*, 1 Bos. and P. 306; *Tappenden v. Randall*, 2 Bos. and P.

467.—15 East, 227. See *Anon.* cited by *Lawrence, J.*, 3 Taunt. 159, and by *Gibbs, C. J.*, 6 Taunt. 117.

(*y*) Doug. 361, 4th ed. 376; 15 East, 226, 229; 9 Barn. and C. 381; 4 Mann. and Ryl. 306; 3 Bing. 359.

(*z*) By *Abbott, C. J.*, 2 Barn. and C. 349.

(*a*) By *Abbott, C. J.*, 4 Barn. and C. 723.

(*b*) By *Holroyd, J.*, 2 Barn. and C. 351.

(*c*) *Gordon v. Swan*, 2 Campb. 429, n. 12 East, 419.

(*d*) *Hogan v. Page*, 1 Bos. and P. 327.

(*e*) *Foster v. Weston*, 6 Bing. 709.

(*f*) *Higgins v. Sargent*, 2 Barn. and C. 343; cited 6 Bing. 714.

(*g*) 15 East, 225; 6 Bing. 714

(*h*) p. 560.

in consequence of the usage of particular branches of trade; or of a special agreement; or of cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it.”(i) And in a case, where, in a Court of Equity, Lord Thurlow allowed interest on a simple contract debt detained, his Lordship observed, “It is the constant practice at Guildhall, (I do not speak from my own experience, but from conversations I have had with the Judges on the subject,) either by the contract, or in damages, to give interest upon every debt detained.”(j) Lord Ellenborough states that, in some [*564] cases, interest is “recovered in the shape of damages for money improperly *retained by the debtor, contrary to the request of the creditor.”(k) “The rule of law,” it is said by Le Blanc, J., “is affirmative, that where a sum is ascertained, and judgment afterwards pronounced thereon in a Court of Record, if an action of debt be brought on that judgment, the jury may give interest by way of damages for the detention of the debt.”(l) Best, C. J., has expressed an opinion,—“However a debt is contracted, if it has been wrongfully withheld by a defendant, after the plaintiff has endeavoured to obtain payment of it, the jury may give interest in the shape of damages for the unjust detention of the money.”(m) And the same learned Judge states, that, from the words above transcribed of Lord Thurlow, “it appears there are two principles, on which interest is given in our Courts; first, where the intent of the parties, that interest should be paid, is to be collected from the terms or nature of the contract; secondly, where the debt has been wrongfully detained from the creditor.” And he continues,—“Our law would not do what it professes to do, namely, provide a remedy for every act of injustice, if it did not allow damages to be given for interest, where a creditor has been kept out of his debt (he using all proper means to recover it) by his debtor. Upon the principle, that the debt has been improperly detained, juries are allowed to give interest in actions on judgments. It is immaterial in such actions, whether the original debt bear interest or not. In cases where the original debt did not bear interest, there is neither an express nor implied contract, enabling the Court to allow interest on an action on the judgment.” And the learned Chief Justice farther says, and, in doing so, delivers, it appears, the opinion of the whole Court of Common Pleas—“The Court, in *Hillhouse v. Davis*, and we, now, say, that although it [interest] be not due *ex contractu*, a party may be entitled to damages, to the amount of interest, for any unreasonable delay in the payment of what is due under the contract.”(n) From a part of the doctrine here laid down, Lord Tenterden dissents in *Page v. Newman*, where the [*565] Court refused to allow *interest on a simple contract debt, secured by a written instrument, and the payment of which was detained. His Lordship observes,—“If we were to adopt as a general rule that, which some of the expressions attributed to the Lord Chief Justice of the Common Pleas, in the report of *Arnott v. Redfern*, would seem to warrant, namely, that interest is recoverable in every case where the principal has been wrongfully detained, after the creditor

(i) *Eddowes v. Hopkins*, Doug. 361, 4th ed. 376.

(j) *Craven v. Tickell*, 1 Ves. jun. 60, 63.

(k) 3 Campb. 297.

(l) 1 M. and Sel. 175.

(m) *Arnott v. Redfern*, 3 Bing. 359.

(n) *Ibid.* 360, 361.

has endeavoured to obtain payment of it, it would necessarily become a question at the trial, whether the detention was wrongful, and whether proper endeavours had been made to obtain payment; and the opening such a question to the jury would, in my opinion, be productive of much inconvenience, and some danger. I think it safer and more convenient to adhere to the long established rule, that interest is not payable upon money secured by a written instrument, unless it appears upon the face of the instrument, that it was intended that interest should be paid, or unless such an intention may be implied from the usage of trade, as in the case of mercantile instruments.”(o)

A Court of Law has refused to allow interest on a debt, amongst other instances,(p)—in *Pinock v. Willett*, where the debt was for goods sold and delivered:(q) in *Gordon v. Swan*, where the debt was for goods sold and delivered, and was contracted in writing, and the contract made it payable at six months, and a claim was made to interest from the expiration of the six months, for which the credit was given:(r) in *Chalie v. The Duke of York*, where the debt was for goods sold and delivered, and where, in 1800, an account had been settled between the parties, and a balance struck in favour of the plaintiff; and in which case, it being contended that the plaintiff was entitled to interest on the account so settled from the year 1800, Lord Ellenborough ruled, that “where the action was for goods sold and delivered, *the mere settling [*566] the balance did not entitle the party to interest from that time; nor was he so entitled, unless a time was fixed for the payment of the money, from which time only interest could be claimed:”(s) in *De Havilland v. Bowerbank*, where the debt was money received by the defendant, as agent for the plaintiff, and in which case a demand of payment was made, but where, to establish a right to interest, there was not a specific agreement to that effect, nor any thing from which a promise to pay interest might be inferred, nor any proof given of the money being used:(t) in *Crockford v. Winter*, where the debt was money which the defendant had by fraud obtained from the plaintiff;(u) in *De Bernales v. Fuller*, where the debt was money which the acceptors of a bill of exchange had paid to the defendants, for the purpose of taking up a bill of exchange held by the plaintiff; and in which case payment was requested, but where there was no contract, express or implied, to pay interest:(v) in *Harington v. Hoggart*, where the debt was money, which, on the sale of an estate by the plaintiff to one S., was by S. deposited with the defendant, an auctioneer, who, not having sold the property on its being put up to auction, disposed of it by private contract to S.; and where, the purchase having been completed, it was decided, the plaintiff was not entitled to recover from the defendant interest on the deposit, the Court holding the defendant to be not a mere agent, but a stakeholder:(w) in *Calton v. Bragg*, where the debt was money lent by the

(o) 4 Mann. and Ryl. 308; 9 Barn. and C. 353. See also 15 East, 227; and, farther, C. 380. 8 Taunt. 249.

(p) *Hare v. Richards*, 7 Bing. 354, 5 Moore & P. 35; *Du Belloix v. Lord Waterpark*, 1 Dowl. & Ryl. 18, cited 2 Mann. & Ryl. 563. (q) 6 Espin. 45.

(r) 2 Campb. 429, n., 13 East, 419, cited 2 Campb. 473, 13 East, 99, and 2 Barn. & v. Munn, Holt, 569, 8 Taunt. 45. (s) 1 Campb. 124.

(t) 2 Campb. 426.

(u) 1 Barn. & Adol. 577. See also *Lee*

plaintiff to the defendant; and where, it should seem, the Court considered the case to be one, in which there was no contract, expressed or implied, for interest; a case of a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, and without any special circumstances, from whence a contract for interest was to be inferred.(x) in *Page v. Newman*, where [*567] the debt was money lent by the plaintiff to the *defendant, and secured by a written instrument, made in France in the following form,—“In one month after my arrival in England, I promise to pay Captain P., or order, the sum of 135*l.* as sterling, for value received;” and in which case Lord Tenterden, C. J., observed,—“The language of the instrument is such, as rather tends to the conclusion, that the parties intended that interest should not be payable. The sum secured is 135*l.* only; it is payable upon a contingency, namely, in a month after the defendant’s arrival in England; and there is no provision for the payment of interest up to that period. If there had been such a provision, that would have gone far to support the argument, that the parties also intended that interest should be paid from the time when the principal became due to the time of actual payment; but the omission of any such provision in the instrument is, to my mind, conclusive to shew, that the sum of 135*l.* was the only sum intended to be paid under any circumstances:”(y) in *Atkinson v. Lord Braybrooke*, where the debt was a judgment of the Supreme Court of Jamaica; this judgment constituting only a simple contract debt:(z) in *Hogan v. Page*, where the debt was secured by a single bond, which did not mention the time of payment:(a) in *Foster v. Weston*, where also the debt was secured by a single bond, but which bond did mention the time of payment, and made the debt payable at three, five, and seven months, from the date:(b) in *Higgins v. Sargent*, where the debt was secured by a policy of assurance, by which the defendants covenanted to pay to the plaintiff 4000*l.*, at the expiration of six months after due proof of the death of R. C. B.; and where the Court decided, that the plaintiff was not entitled to interest on the money so secured.(c)

A Court of Law has allowed interest on a debt, amongst other instances,(d)—in *Laing v. Stone*, where the debt was money *secured by a promissory note, payable three months after date, and where at the trial it was admitted that the principal had been satisfied, and that the action was brought for the interest; and in which case the Court decided, that the note carried interest after the three months:(e) in *Nichol v. Thompson*, where the debt was the balance of an account, and, on inspecting the account, it appeared that interest had been allowed on former balances, which evidenced the mode of dealing between the parties:(f) in *Bruce v. Hunter*, where the debt was the balance of an ac-

(x) 15 East, 223.

(y) 4 Mann. & Ry. 305, 9 Barn. & C. 378.

(z) 4 Campb. 380, 1 Stark. 219. See also *Hunter v. Bowes*, stated 1 M. & Sel. 173.

(a) 1 Bos. & P. 337.

(b) 6 Bing. 709.

(c) 2 Barn. & C. 348.

(d) *Robinson v. Bland*, 2 Burr. 1077,

1085, 1 W. Bl. 234, 256; *Blaney v. Hendricks*, 2 W. Bl. 761, 3 Wils. 205, cited 15 East, 228, and 2 Barn. & C. 349; *Blake v. Lawrence*, 4 Espin. 147; *Slack v. Lowell*, 3 Taunt. 157; *Anon.* cited by *Lawrence, J.*, 3 Taunt. 159, and by *Gibbs, C. J.*, 6 Taunt. 117.

(e) 2 Mann. & Ry. 561.

(f) 1 Campb. 52, n.

count arising from mercantile business transacted by the plaintiffs, as agents for the defendant; the circumstances of the case being, that the plaintiffs delivered an account to the defendant annually, and at the close of each year, from the expiration of the first, charged interest, and at each rest the interest of the preceding year was added to the principal; and in which case, it being proved that, for several years, when the annual accounts were rendered, the defendant did not object to the charge of interest, the accounts afforded sufficient evidence of a promise, on the defendant's part, to pay interest in the manner charged: *(g)* in *Marshall v. Poole*, where the debt was money owing for goods sold and delivered, and where the sale was made on an agreement for payment in bills, at two months, and the defendants, the purchasers, broke their contract by not giving the bills: *(h)* in *Porter v. Palsgrave*, where the circumstances of the case were similar to those in the one last mentioned, and the Court allowed interest from the day the bill, if accepted, would have become due: *(i)* in *Boyce v. Warburton*, also a like case, but where the defendant broke his contract, not only by not giving the bill, but by not accepting the goods purchased; and where also the Court allowed interest on the amount of the stipulated price, from the time the bill, if given, would have become due: *(j)* in *De Bernales v. Wood*, where the debt was money, which, on the purchase of an estate, *the plaintiff deposited according to the conditions of sale, and which de- [*569] posit the plaintiff recovered from the defendant, the vendor, *(k)* it being clearly proved that the estate was incumbered with judgments, so that a good title could not be made; and where the Court allowed interest from the day, when the purchase ought to have been completed: *(l)* in *Farquhar v. Farley*, where the debt was money, which, on the purchase of a reversionary interest in certain bank stock, the plaintiff deposited with the auctioneers, whom after four years, the title not being satisfactorily deduced, the plaintiff sued for principal and interest, and recovered the principal only; and in which case of *Farquhar v. Farley* the plaintiff sued the vendor, and where it was decided the plaintiff was entitled to recover, in the shape of damages, what he had lost of interest on his deposit: *(m)* in *Pinhorn v. Tuckington*, where the debt was money due on a balance of accounts, and which money the defendant was, by an award, ordered to pay to the plaintiffs on a certain day, and at a particular place; and on a demand made on the day at the place appointed, the money was not paid pursuant to the award; and, in which case, the Court allowed interest from the day, on which the money was by the award to be paid: *(n)* in *Farquhar v. Morris*, where the debt was money secured by a bond dated on a day certain, in the penal sum of 800*l.*, conditioned to pay 400*l.*; and in which bond no day of payment was expressly named, nor interest reserved in terms; and where the Court said, "This bond is payable at a day certain, for it is payable on the day of the date, no other time being mentioned for payment;" and decided, that interest was payable

(g) 3 Campb. 467.

(h) 13 East, 98.

(i) 2 Campb. 472.

(j) 2 Campb. 480.

(k) See 8 Taunt. 55, and 7 Taunt. 595.

(l) 3 Campb. 258. See *Walker v. Constable*, 1 Bos. & P. 306, where a purchaser

failed to recover interest on a deposit, under a count for money had and received.

(m) 7 Taunt. 592. See also 1 Barn. & Adol. 588, 590.

(n) 3 Campb. 468. See also *Churcher and Stringer's case*, 2 Barn. and Adol. 777.

from the time of payment, namely, from the date, though not expressly reserved.(o)

[*570] When, by a bond, a person binds himself in a certain sum of *money, and to the bond there is annexed a condition, making the bond void on the doing of some particular act, as the payment of a smaller sum of money, or the performance of covenants; in this case the sum, in which the obligor is bound, is a penalty, which the obligor binds himself to pay, if the terms of the condition are not fulfilled, and from which penalty he is discharged if the same terms are fulfilled by him.(p) If to a bond, by which a person binds himself in a certain sum of money, there is not annexed any condition making that sum a penalty, the bond is called a single one, *simplex obligatio*; and the sum, in which the obligor is so bound, constitutes a debt from him to the obligee.(q) And interest on or beyond that sum is not recoverable in an action at law, unless there is some farther contract, express or implied, to pay interest.(r) When a bond is made with a penalty, and the condition is broken, then, notwithstanding some authorities to the contrary,(s) the modern doctrine clearly is, that, in an action at law on the bond, it is not allowed to recover damages beyond the penalty;(t) or, if the condition is to pay a sum of money with interest, to recover for principal and interest a sum greater than the penalty.(u) But after judgment obtained in an action on a bond conditioned to pay a sum of money, the nature of the demand is altered; and, in an action on the judgment, it is competent to the jury to allow interest to the amount of what is due for principal and interest, although this amount exceeds the penalty of the bond; and in this respect there is no difference between a foreign judgment and a judgment in a Court of Record here.(v)

[*571]

*SECTION II.

OF ALLOWING INTEREST IN A COURT OF EQUITY.

GENERALLY speaking, a Court of Equity allows interest on a debt, due on a security, which, at law, carries interest.(w) It therefore allows interest on a bill of exchange;(x) on a promissory note,(y) which promises to pay the debt on a day certain,(z) or on demand;(a) and on a

(o) 7 Durn. and E. 124, cited 15 East, 225.

(p) 2 Bl. Com. 340.

(q) Co. Litt. 172 a.; 2 Shep. Touchst. 367; 2 Bl. Com. 340; 6 Bing. 713.

(r) Hogan v. Page, 1 Bos. and P. 337; Foster v. Weston, 6 Bing. 709.

(s) Lord Lonadale v. Church, 2 Durn. and E. 388.

(t) White v. Sealey, Doug. 49; Brangwin v. Perrot, 2 W. Bl. 1190; Wilde v. Clarkson, 6 Durn. and E. 303; Shutt v. Procter, 2 Marsh. 226.

(u) M'Clure v. Dunkin, 1 East, 436—1 Dick. 308.

(v) M'Clure v. Dunkin, 1 East. 436;

cited 6 Ves. 415, and 1 Ball and B. 310. See 2 Ves. jun. 162, 165.

(w) Grosvenor v. Cook, 1 Dick. 305, 308; Parker v. Hutchinson, 3 Ves. 133; Upton v. Lord Ferrers, 5 Ves. 803; Dornford v. Dornford, 12 Ves. 129. See Rigby v. Macnamara, 2 Cox, 420.

(x) Montgomery v. Bridge, 2 Dow and Clarke, 299, 300.

(y) See Lithgow v. Lyon, Coop. 29.

(z) Lowndes v. Collens, 17 Ves. 27.—5 Ves. 803. See Rigby v. Macnamara, 2 Cox, 420.

(a) Upton v. Lord Ferrers, 5 Ves. 801.—17 Ves. 28, 29. See also Adams v. Gale, 2 Atk. 106.

bond in a certain sum by way of penalty, and made to secure the payment of a smaller sum. (b)

Excepting money due on a bill of exchange, or due on a promissory note, payable at a day certain, or on demand; and except, perhaps, the case of a promise in writing to pay money on a day certain, (c) and, under particular circumstances, the case of a debt detained from the creditor; (d) generally speaking, a Court of Equity does not allow interest on a simple contract debt, (e) as where the money owing is a book-debt, (f) or is secured by a promissory note, payable neither on a day certain, nor expressly on demand, (g) or is "a balance of an open and mutual account," (h) or is due "upon a balance of accounts." (i)

*When a bond is made with a penalty, and the condition [*572] is broken, in general cases a Court of Equity will not decree damages beyond the penalty, (j) or, if the condition is to pay a sum of money with interest, decree the payment, for principal and interest, of a sum greater than the penalty. (k) And, in general cases, the Court will not go beyond the penalty, although, in an action at law, judgment has been entered up on the bond; (l) or although the obligor has by his will devised his land, in trust for, or charged it with, the payment of his debts. (m)

In particular cases, however, a Court of Equity will decree the payment of interest, or other sum of money, beyond the penalty of a bond; (n) the Court affording this relief to the obligee, on the ground, in some instances, that the obligor has made the Court the instrument of delaying payment to the obligee; or, according to different expressions of that ground,—that the party "is by injunction prevented from re-

(b) 2 Atk. 440.

(c) *Parker v. Hutchinson*, 3 Ves. 123, apparently cited 5 Ves. 803; *Lowndes v. Collins*, 17 Ves. 27; *Tunstall v. Trappes* (*Goslings' case*), 3 Sim. 306. See also 2 Bro. C. C. 3.

(d) 1 P. W. 396; 1 Dick. 428; *Craven v. Tickell*, 1 Ves. jun. 60.

(e) 2 Ves. 588; 2 Atk. 110; 2 Ves. jun. 161, 165; *Lloyd v. Baldwyn*, 1 Dick. 139; *Bedford v. Coke*, ib., 178, cited ib., 308, 309, and 2 Ves. jun. 166.

(f) *Grosvenor v. Cook*, 1 Dick. 305, 308. —3 Ch. Rep. 64, 65; *Nels.* 136; 2 Freem. 133.

(g) *Grosvenor v. Cook*, or *Coke*, 1 Dick. 305, cited 2 Ves. jun. 168, and 3 Ves. 134. See 2 Bro. C. C. 3; 3 Ves. 135; 12 Ves. 129; and *Lithgow v. Lyon*, Coop. 29.

(h) *Borret v. Goodere*, 1 Dick. 428.

(i) *Ryves v. Coleman*, 2 Atk. 489. See *Ashton v. Smith*, 14 Vin. Abr. 458, cited 15 East. 225; *Boddam v. Riley*, 3 Bro. C. C. 2, 4 Bro. P. C. ed. Toml. 561; and *Barwell v. Parker*, 2 Ves. 365.

(j) *Davis v. Curtis*, 1 Ch. Cas. 226.

(k) *Stewart v. Rumball*, 2 Vern. 509; *Bromley v. Goodere*, 1 Atk. 75, 80; *Grosvenor v. Cook*, 1 Dick. 305; *Gibson v. Egerston*, ib. 408; *Kettleby v. Kettleby*, 2 Dick.

514, also stated 3 Bro. C. C. 492, and cited 2 Anstr. 527, and 2 Ves. and B. 288; *Tew v. Earl of Winterton*, 3 Bro. C. C. 489; *Knight v. Maclean*, 3 Bro. C. C. 496, 2 Dick. 516, n.; *Lloyd v. Hatchett*, 2 Anstr. 525; *Mackworth v. Thomas*, 5 Ves. 329, cited 3 Sim. 141. See *Hale v. Thomas*, 1 Vern. 349, 2 Ch. Cas. 182, 186.

(l) *Gibson v. Egerton*, and *Bumsted v. Stiles*, 1 Dick. 408; *Tew v. Earl of Winterton*, 3 Bro. C. C. 489; *Sharpe v. Earl of Scarborough*, 3 Ves. 557; *Clarke v. Seton*, 6 Ves. 411; *Moore v. M'Namara*, 1 Ball and B. 309.

(m) *Anon.*, 1 Salk. 154, cited 2 Ves. and B. 281; *Kettleby v. Kettleby*, 2 Dick. 514, cited 2 Anstr. 527; *Tew v. Earl of Winterton*, 3 Bro. C. C. 489.

(n) *Anon.*, 1 Salk. 154, cited 2 Ves. and B. 281; *Elliott v. Davis*, Bunb. 23; *Duvall v. Terrey*, Show. P. C. 15, cited 6 Ves. 79, 415, 416, 3 Russ. 607, and 3 Sim. 363; *Atkinson v. Atkinson*, 1 Ball and B. 238; *Grant v. Grant*, 3 Russ. 598, 3 Sim. 340; *Jeudwine v. Agate*, 3 Sim. 129. See also 1 Vern. 350, 6 Ves. 92, 415, and 1 Rose, 401. On the question, whether the excess of the debt, beyond the penalty, is a debt by specialty or by simple contract, see 3 Bro. C. C. 500, and 3 Russ. 609.

covering his debt at law:"(o) "that the party was prevented from going on at law, while the demand was under the penalty:"(p) "that a party, who had been restrained from proceeding at law, while the debt was under the penalty, had a right, in a Court of Equity, to principal and interest beyond the penalty of the bond:"(q) * "that if a person, indebted in a sum of money by bond, files his bill for an injunction, stating that he is entitled, by reason of equitable circumstances, to be relieved from the obligation which presses him at law, and there is no neglect or default on the part of the defendant, this Court [Chancery] has a right to consider the bond-creditor [debtor] as submitting to do equity, when he asks equity:"(r) "that if a party chooses, by improper proceedings, to prevent a creditor from having payment as soon as the creditor ought, those proceedings shall not operate to the prejudice of the creditor; but he shall be considered as entitled to receive what is really the amount due to him; and, notwithstanding there is a form of penalty in the bond, that shall not be the limitation of what shall be recovered by him."(s)

If a creditor has two securities for the same debt, one by bond, the other by mortgage, the mortgage being to secure the payment of the principal, together with all interest that may grow due thereon; in this case, if the creditor resorts to the mortgage for payment, he is entitled to be paid the whole amount of principal and interest, although it exceeds the penalty of the bond.(t)

When a person is a creditor by judgment, as by judgment obtained in an action of covenant, or trespass on the case upon promises, then, in general cases, and except under particular circumstances,(u) a Court of Equity, when it decrees payment of such debt, does not allow interest on it.(v) In *Deschamps v. Vanneck*, interest was not allowed on a judgment against assets *quando acciderint*.(w) *Berrington v. Evans* was a creditors' suit, in which it had been referred to the Master to take the usual accounts. An exception to the Master's report was taken by [*574] certain creditors, on the ground that the Master had disallowed a *claim of interest on judgments, obtained by the creditors several years back, and which they had been prevented from rendering available, by the decree and subsequent proceedings in this suit. By Lord Lyndhurst,—“It does not appear that any case can be found, in which interest has been allowed on a judgment, merely because the progress of the cause has created some delay. Suppose there are assets outstanding, requiring considerable time to render them available; is there any case in which that alone has been considered a ground for interest on a judgment? The question would necessarily arise in every suit, more or less.” The exception was accordingly overruled.(x)

(o) 1 Ball and B. 239.

(p) 6 Ves. 79, 3 Sim. 363.

(q) 3 Russ. 607.

(r) 3 Russ. 609.

(s) 3 Sim. 364.

(t) *Clarke v. Lord Abington*, 17 Ves. 106; *Kerwin v. Blake*, 14 Vin. Abr. 460, 2 Eq. Cas. Abr. 533; *Kirwane v. Blake*, 4 Bro. P. C. ed. Toml. 532. See also *Godfrey v. Watson*, 3 Atk. 517.

(u) *Earl of Bath v. Earl of Bradford*, 3 Ves. 587.—3 Y. and Jerv. 395, 399. See *Wainwright v. Healy*, 2 Dick. 444.

(v) *Gibson v. Egerton*, and *Bumsted v. Stiles*, 1 Dick. 408; *Stiles v. Attorney General*, 1 West Cas. T. Hardw. 132; *Lewes v. Morgan*, 3 Y. and Jerv. 394, 395, 399.—2 Ves. jun. 718, 719.

(w) 2 Ves. jun. 716.

(x) 1 Younge, 376, 280.

When, however, a judgment is entered up with a penalty, and is defeazanced to pay a certain sum and interest, the creditor is entitled to the amount of principal and interest up to the extent of the penalty.(y) And although the defeazance does not specify any thing about interest, yet if the security is given for the payment of a particular sum on a certain day, it appears that, in a Court of Equity, that sum will carry interest from the day on which it is to be paid.(z)

As, generally speaking, a Court of Equity will not decree payment beyond the penalty of a bond, so likewise in general cases it will not go beyond the penalty of a recognizance,(a) or judgment.(b) Particular circumstances created an exception to this rule in *Atkinson v. Atkinson*, where the Court allowed to a judgment creditor interest beyond the penalty.(c) Interest beyond the penalty was likewise allowed in *Godfrey v. Watson*.(d)

When, by a will, freehold land is devised in trust for, or charged with, the payment of debts, the creditors are, out of this fund, entitled to be paid with interest on debts which carry interest,(e) *but in [*575] general cases, and except under particular circumstances,(f) not, it would seem, on debts by simple contract, which otherwise, or if payable out of legal personal assets, do not carry interest.(g) In *Tait v. Lord Northwick*, a simple contract creditor was held not to be entitled to interest on his debt, although the will of the debtor contained a devise of real estate, upon trust to pay all debts, which the testator should at the time of his death owe to any person "by mortgage, bond, or other specialty, or by simple contract, or otherwise howsoever, and all interest thereof."(h)

When, by a decree, it is referred to the Master, to take an account of the debts of a person deceased, testator or intestate, and to compute interest on such of the debts as carry interest; and, on the cause coming on to be heard for farther directions, it is referred back to the Master, to compute subsequent interest on the debts from the foot of his report; then, it appears, it is the duty of the Master, to compute subsequent interest on the debts, on which he had before computed interest, from the foot of his report, but not to compute interest on simple contract debts, not carrying interest, although such debts are liquidated by the former report, which has been confirmed.(i)

The rate of interest allowed by a Court of Equity on debts seems to

(y) *Tunstall v. Trappes* (Lawson's case), 3 Sim. 299.

(z) *Tunstall v. Trappes* (Goslings' case), 3 Sim. 306.

(a) *Bidlake v. Lord Arundel*, 1 Ch. Rep. 93; *Jevon v. Bush*, 1 Vern. 342.

(b) 1 Ball and B. 238, 239.

(c) 1 Ball and B. 238.

(d) 3 Atk. 617, apparently cited 3 Y. and Jerv. 395. See *Lloyd v. Hatchett*, 2 Anstr. 525, and *Clarke v. Lord Abingdon*, 17 Ves. 106. And on allowing interest on a judgment, which may be tacked to a mortgage, see, farther, 3 Y. and Jerv. 399.

(e) 2 Atk. 110.

(f) *Lloyd v. Williams*, 2 Atk. 108, Barn. Ch. Rep. 224.—2 Ves. 588.

(g) *Dolman v. Pritman*, 3 Ch. Rep. 64;

Dolben, or Dalbin, v. Pritiman, 8 C., Nels. 136, 2 Freem. 133; *Lloyd v. Williams*, 2 Atk. 110, Barn. Ch. Rep. 224; *Barwell v. Parker*, 2 Ves. 363; *Earl of Bath v. Earl of Bradford*, ib., 588; *Stewart v. Noble*, 1 Vern. and Scriv. 528, 536. See *Car v. Countess of Burlington*, 1 P. W. 5th ed. 228, and 229, n. (1); *Bothomly v. Lord Fairfax*, 1 P. W. 334; and *Shirley v. Earl Ferrers*, 1 Bro. C. C. 41.

(h) 4 Ves. 816, 823.

(i) *Lloyd v. Baldwyn*, 1 Dick. 139; *Bedford v. Coke*, ib., 178; *Creuze v. Hunter*, or *Lowth*, 2 Ves. jun. 157, 4 Bro. C. C. 157, 316. See *Bickham v. Cross*, 2 Ves. 471, cited 2 Ves. jun. 160; *Neal v. Attorney General*, Mos. 246; and *Wainwright v. Healy*, 2 Dick. 444.

be four per cent.,(j) unless a different rate is expressly contracted for, or the security carries at law five per cent., when this different rate of interest appears to be allowed by the Court.(k)

[*576] *In *Lady Montgomery v. Bridge*, a widow entered into an engagement to pay the whole of her deceased husband's debts, and executed a minute, and afterwards a formal instrument, to that effect. And it was decided, that the engagement extended to the payment of interest on such debts, as *ex contractu* or *ex lege* bore interest, and that therefore the creditors were entitled to interest, as well on bills of exchange as on debts secured by bond.(l)

[*577]

*CHAPTER XL.

OF DEBTS PAYABLE OUT OF A SEPARATE ESTATE, THE ASSETS OF A MARRIED WOMAN.

A POWER of disposition is naturally incident to property; and, generally speaking, therefore, and in particular except so far as that power may be limited by a clause against anticipation contained in a settlement,(a) a married woman is, by virtue of the same power, at full liberty to dispose of her separate estate, and an express authority to make this disposition is unnecessary.(b) And where there is not such express authority, a wife may, it is clear, alien her separate estate, in whatever legal manner she pleases.(c)

When real estate is settled to the separate use of a married woman, she is entitled without the concurrence of her trustees,(d) unless this concurrence is required by the settlement,(e) in common cases to sell,(f) or mortgage,(g) this separate estate, or convey it for the purpose of securing the repayment of future *advances of money,(h)

[*578] or charge it with the payment of an annuity.(i)

(j) *Bickham v. Cross*, above; *Grosvenor v. Cook*, 1 Dick. 305, 309; *Parker v. Hutchinson*, 3 Ves. 138.

(k) *Bickham v. Cross*, above; *Upton v. Lord Ferrers*, 5 Ves. 801, 803; *Lowndes v. Collens*, 17 Ves. 27.

(l) 2 Dow and Clark, 297.

(a) That, when desired, it is legal on settling a separate estate, real or personal, to prevent any disposition of it by way of anticipation, see 3 Atk. 542, 3 Bro. C. C. 347, 4 Bro. C. C. 486, 9 Ves. 494, 524, 11 Ves. 221, and 18 Ves. 434. A clause against anticipation is found in *Jackson v. Hobhouse*, 2 Mer. 483; *Ritchie v. Broadbent*, 2 Jac. & W. 456; and *Barton v. Briscoe*, Jacob, 603. In the following cases, the terms of the particular settlements were held not to be preventive of anticipation; *Pybus v. Smith*, 3 Bro. C. C. 340, 1 Ves. jun. 189; *Wagstaff v. Smith*, 9 Ves. 520; *Acton v. White*, 1 Sim. & St. 429; *Glyn v. Baster*, 1 Y. & Jerv. 329.

(b) 2 Ves. 191; *Amb. ed. Blunt*, 841; 1

Ves. jun. 48, 49; 10 Ves. 581; 1 Madd. 261; 3 Madd. 389; 5 Madd. 418; 1 Sim. & St. 432.

(c) *Hulme v. Tenant*, 1 Bro. C. C. 16, 2 Dick. 560; *Burnaby v. Griffin*, 3 Ves. 266.

(d) *Penne v. Peacock*, Cas. T. Talb. 41; *Grigby v. Cox*, 1 Ves. 517; *Pybus v. Smith*, 1 Ves. jun. 189, 3 Bro. C. C. 340; *Essex v. Atkins*, 14 Ves. 542, 547.

(e) 1 Ves. 518; 1 Bro. C. C. 17; 1 Ves. jun. 193, 194; 14 Ves. 547.

(f) *Grigby v. Cox*, 1 Ves. 517, cited 1 Bro. C. C. 20; *Parkes v. White*, 11 Ves. 209; *Witts v. Dawkins*, 12 Ves. 501; *Acton v. White*, 1 Sim. & St. 429; *Davidson v. Gardner*, Sugd. Vend. & P. 6th ed. 574, 575.

(g) *Penne v. Peacock*, and *Pybus v. Smith*, above.

(h) *Pybus v. Smith*, 1 Ves. jun. 189.

(i) *Jones v. Harris*, 9 Ves. 486; *Essex v. Atkins*, 14 Ves. 542, 547; *Power v. Bailey*, 1 Ball & B. 49; *Glyn v. Baster*, 1 Y. & Jerv. 329. See *Mores v. Huish*, 5 Ves. 692.

So when personal estate is settled to the separate use of a married woman, she is entitled without the concurrence of her trustees,(j) unless their concurrence is required by the settlement,(k) in common cases to sell,(l) or mortgage(m) this separate estate, or convey it for the purpose of securing the repayment of future advances of money,(n) or to charge it with the payment of an annuity.(o)

A married woman may, moreover, affect her separate estate, by means of her bond,(p) bill of exchange,(q) or promissory note.(r) And where she has both an interest and power, as where real or personal estate is vested in trustees, in trust for her appointees, to be named by deed or instrument in writing, and, in default of appointment, in trust for her separate use for life, an instrument executed by her, as a bond or promissory note, may affect her interest or estate in the property, although it may not be valid as an appointment under the power.(s) It appears to be clear, that an appointment under a power to appoint a separate estate must, like an appointment of property which is not "a separate estate, pursue the terms of the power, and [*579] will not be valid unless such terms are complied with.(t)

It must be stated to be doubtful, whether a separate estate of a married woman is liable to the payment of debts, verbally only, and not in writing, contracted by her.(u)

When a married woman's separate property consists of either real or personal estate, she may dispose of or affect it by her agreement in writing, such her intention being expressed in the agreement.(v) But it has been repeatedly decided, that a moral obligation, in other words, a married woman's general engagement, or implied *assumpsit*, is not sufficient to sustain a claim against her separate estate.(w) To this effect, it has been determined in several cases, that if, when a married woman has a separate estate, she grants an annuity out of it, the consideration money paid for the annuity is not recoverable back out of her separate property,

(j) *Grigby v. Cox*, 1 Ves. 517, and *Essex v. Atkins*, above.

(k) 1 Ves. 518; 1 Bro. C. C. 17; 14 Ves. 547.

(l) *Sturgis v. Corp*, 13 Ves. 190; where the separate property was an estate in remainder, expectant on a limitation in trust for another party for life. *Browne v. Like*, 14 Ves. 302; *Headen v. Rosher*, *McClell. & Y.* 89. See also *Machorro, or Machellan, v. Stonehouse*, cited 1 Bro. C. C. 18, 19, and 2 Dick. 561; and *Whistler v. Newman*, 4 Ves. 129.

(m) *Penne v. Peacock*, *Cas. T. Talb.* 41.

(n) *Pybus v. Smith*, above.

(o) *Wagstaff v. Smith*, 9 Ves. 520; *Essex v. Atkins*, 14 Ves. 542, 547; *Aguilar v. Aguilar*, 5 Madd. 414; *Glyn v. Baster*, 1 Y. & Jerv. 329.

(p) *Norton v. Turvill*, 2 P. W. 144; *Hulme v. Tenant*, 1 Bro. C. C. 16, 2 Dick. 560, cited 8 Ves. 175, 9 Ves. 492, 493, 497; *Heatley v. Thomas*, 15 Ves. 596.

(q) *Stuart v. Lord Kirkwall*, 3 Madd. 387

(r) *Bullpin v. Clarke*, 17 Ves. 365, as to the personal estate in this case settled.

(s) *Standford v. Marshall*, 2 Atk. 68; *Bullpin v. Clarke*, 17 Ves. 365, as to the real estate in this case settled. See also *Allen v. Papworth*, 1 Ves. 163, *Belt's Supplem.* 2nd ed. 91, 96; *Ellis v. Atkinson*, 3 Bro. C. C. 346, n., 565; *Clarke v. Pistor*, 3 Bro. C. C. 346, n.; and *Chesslyn v. Smith*, 8 Ves. 183.

(t) *Gold v. Rutland*, 1 Eq. Cas. Abr. 346, Ca. 18; *Earl of Dorset v. Powle*, 2 Ch. Rep. 411; *Reid v. Shergold*, 10 Ves. 370.—1 Ves. jun. 193, 194; 9 Ves. 497; 1 Madd. 261.

(u) *Clerk v. Miller*, 2 Atk. 379; *Clinton v. Willes*, *Sugd. Pow.* 3rd ed. 115, n. See also 1 Bro. C. C. 20, and 3 Madd. 88, 92.

(v) *Master v. Fuller*, 4 Bro. C. C. 19, 1 Ves. jun. 513. See also 2 Dick. 562, and 1 Bro. C. C. 20.

(w) *Duke of Bolton v. Williams*, 2 Ves. jun. 138, 4 Bro. C. C. 297, cited 9 Ves. 496, and 1 Ball & B. 52; *Jones v. Harris*, 9 Ves. 496; *Angell v. Hadden*, 16 Ves. 202, 2 Mer. 164, 169; *Aguilar v. Aguilar*, 5 Madd. 414. See also *Francis v. Wigzell*, 1 Madd. 258, *Greatley v. Noble*, 3 Madd. 79, and

if the grant becomes void through the negligence of the grantee to perfect the grant according to the provisions in the Annuity Act. (x) The following observations of Sir John Leach occur in *Greatley v. Noble*,—"In this view of the case, it is not necessary to determine the general point, as to the liability of a feme covert's separate estate to answer [*580] general demands upon *her. At law there can be no separate enjoyment of property by a feme covert; in equity there may; and, as incident to the power of enjoyment, she has a power of charging her separate property. Where a wife, as in *Hulme v. Tenant*, and other cases, joins with her husband in a security, it is implied to be an execution of her power to charge her separate property. If it were necessary now to decide the point, I think it would be difficult to find either principle or authority for reaching the separate estate of a feme covert, as if she were a feme sole, without any charge on her part, either express or to be implied." (y) And in *Stuart v. Lord Kirkwall*, the same learned judge repeated,—"I had occasion to consider this doctrine fully in the case of *Greatley v. Noble*. I then was, and now am of opinion, that a feme covert being incapable of contract, this Court [Chancery] cannot subject her separate property to general demands." (z) And in a later case, Sir John Leach, after observing that the cases had fully established, that there could be no lien on a married woman's separate estate for the consideration of an annuity granted out of it, proceeded,—"And the reason was plain; a feme covert could not, by the equitable possession of separate property, acquire a power of contract; she had a power of disposition, as incident to property, and her actual disposition or appointment of the property would bind her. This Court [Chancery] would apply her separate property in payment of an annuity which she had charged upon it, but it could not apply her separate property in repayment of the consideration of that annuity, which she had not charged upon it. Being incapable of contract or general engagement, this Court could not fasten on her separate property those equities, which arise out of contract and general engagement." (a)

Besides the modes of disposition before mentioned, a married woman may also in the life-time of her husband, and independently of his consent, dispose of her separate personal estate by her will. (b) In a case [*581] where a married woman had a power to *dispose by will of a sum of money, which, for want of appointment, was limited to her executors or administrators; and she made a will, and

Stuart v. Lord Kirkwall, ib. 387. It may be noticed, that in Lord Thurlow's observations in *Hulme v. Tenant*, 1 Bro. C. C. 16, his Lordship seems to include a bond in the term "general engagement," since that case arose on a bond of the wife. See also observations of counsel, 3 Madd. 92, 93, on this expression of Lord Thurlow. But, that a bond, or promissory note, or bill of exchange, is not a general engagement in the modern meaning of the phrase general engagement, see *Heatley v. Thomas*, 15 Ves. 596, *Bullpin v. Clarke*, 17 Ves. 365, and *Stuart v. Lord Kirkwall*, 3 Madd. 387.

(x) *Duke of Bolton v. Williams, Jones v. Harris, Angell v. Hadden*, and *Aguilar v. Aguilar*, above.

(y) 3 Madd. 94.

(z) 3 Madd. 388.

(a) 5 Madd. 418.

(b) *Norton v. Turvill*, 2 P. W. 144; *Anon.* cited 2 Ves. 192; *Fettiplace v. Gorges*, 1 Ves. jun. 48, 3 Bro. C. C. 8; *Hales v. Margerum*, 3 Ves. 299; *Rich v. Cockell*, 9 Ves. 369, 375, 379. See also 3 Atk. 160, 2 Ves. 191, and 4 Taunt. 297; and *Rex v. Bettesworth*, 2 Stra. 1118.

named an executor, but made no particular appointment of the money; such money was held not to devolve to her husband, who survived her, but to belong to her executor, and to be part of her assets.(c)

Out of a separate estate, which are the assets of a married woman deceased, a Court of Equity pays her debts by bond and by simple contract *pari passu*, or equally; "the bond, considered merely as a bond, being void."(d) But out of the same estate, a Court of Equity has, it seems, given her executor a preference before her other creditors, by permitting him to retain his own debt.(e)

Generally speaking, a husband is under a "strict legal necessity" of burying his wife.(f) And probably, in general cases, this duty falls on him, notwithstanding the wife is possessed of an estate to her separate use;(g) although, in particular instances, he may have the right to throw her funeral expenses on that estate.(h) In *Gregory v. Lockyer*, the separate estate of a feme covert was by the decree directed to be applied in payment of her debts and funeral expenses. The husband, having actually paid them, claimed before the Master to have the money repaid by her executor. And Sir John Leach made the order, considering himself as bound by the decree; but expressed a doubt whether, generally, the husband has a right to throw the wife's funeral expenses upon her separate estate.(i)

*In *Norton v. Turvill*, where the bond and other creditors of a married woman were decreed to be paid out of her [*582] separate estate, the Court, with reference to the order, in which her assets should be taken, held, that to the purpose of paying the debts, "such part of the separate estate, as is undisposed of by the will, ought to be first applied; in the next place, if that be not sufficient, the creditors are to be paid out of any money legacies given by the feme covert; and lastly, supposing there is still a deficiency, all the specific legatees ought to contribute in proportion."(j)

(c) *Churchill v. Dibben*, 3 Kenyon, part 2, p. 68, 86, Sugd. Pow. 3rd ed. 284, n.

(d) *Anon.*, Mos. 328; *Anon.*, 18 Ves. 258.

(e) *Anon.*, Mos. 328. That generally speaking, however, an executor is not allowed to retain, out of equitable assets, his own debt, see the authorities referred to at p. 271 of the present Treatise.

(f) *Jenkins v. Tucker*, 1 H. Bl. 90.—9 Mod. 32.

(g) *Bertie v. Lord Chesterfield*, 9 Mod. 31.

(h) *Anon.*, Mos. 328; *Poole v. Harrington*, Toth. tit. Feme Covert, ed. 1820, p. 97.

(i) 6 Madd. 90.

(j) 2 P. W. 144.

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A
TREATISE
ON THE
EXPOSITION OF WILLS
OF
LANDED PROPERTY.

By JAMES RAM, Esq.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

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P R E F A C E.

THE following Treatise has been prepared to exhibit, in a small compass and practical form, one of the most important branches of the law of real property—the law on the Exposition of Wills. As few owners of any description of landed property die intestate; and as, in consequence, few titles to estates are found without a will in them; the law on the exposition of devises is, necessarily, a subject of universal interest and daily investigation. The Author has aimed to compile a book to be useful in the interpretation of wills of common occurrence. To this end, he has selected for his materials, exclusively the authorities, and principles of construction, of frequent practical application. It has formed a part of his plan, in the exposition of many of the cases, to transcribe the language of the Bench, as their best explanation; and he has sought farther to increase the usefulness of the work, with little addition to the length of it, by the many references which will be found dispersedly made to the margin, for numerous cases of similar import with those mentioned in the text. The latest authorities have, when practicable, been preferred for illustration: a few which have been published during the progress of the work in the press are added at the end.

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A
TREATISE
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THE EXPOSITION OF WILLS
OF
LANDED PROPERTY.

CHAPTER I.

INTENTION, THE LAW OF DEVISES.

THE cases on the subject appear to authorize the general position, that the *intention* of the testator is the law of devises.

In a *deed*, technical form and language are often essential to give effect to the intention of the parties, on the principle, that a deed is made with mature deliberation, and with knowledge of the laws.(a)

A greater latitude of construction is permitted of wills, on the principle, that a testator is not supposed(b) to be acquainted with legal form and language;(c) and that it is a reasonable indulgence, to leave to every one the power to make his own will in his own way.

*The exposition of wills has always been governed by the intention of the testator. Before the Statute of Wills, 32 [*2] Hen. VIII., c. 1, this was a part of the common law.(d)

Since the Statute of Wills, the same principle has been invariably acknowledged. The early(e) cases all notice it; and many of the most learned of the judges, in later times, have insisted on this principle in pointed and remarkable language. Mr. Justice Wilmot has said, "the principle that must govern all cases of this kind, is the intention of the testator, which is the Pole-star for the direction of devises."(f) Lord Chief Justice Willes: "The rule is, that *voluntas testatoris totum est*."(g) Lord Kenyon, also: "I am clearly of opinion, that the inten-

(a) 1 P. W. 20. 2 Bl. C. 381.

(b) 2 Atk. 580. Willes, 213.

(c) 2 Bl. C. 381. 1 P. W. 20.

(d) Litt. S. 586. Bro. Abr. Devise 1, 29, 38, 39, 52. 6 Mod. 110. 1 Salk. 237. 1 P. W. 20.

(e) 2 Dyer, 122 a (20), 171 a (7); 3 Dyer, 261 b (27). Lingens's case, ib. 323 a. Clache's case, ib. 330.

(f) 2 Burr. 1112. See, also, 1 Madd. Rep. 439.

(g) 1 Atk. 377.

tion of the testator is the Polar-star, by which we should be guided in the construction of wills.”(h) And Lord Loughborough: “It is my duty to give effect to the will, as far as the intention can be clearly made out. It is not permitted to me to be affectedly ignorant of the intention; much less to control a certain established intention upon my own idea of the fitness or unfitness, the liberality, or the political tendency of it.”(i)

[*3]

*CHAPTER II.

OF ILLEGAL DEVISES.

SECTION I.

OF PROSPECTIVE DEVISES OF AFTER-PURCHASED LANDS.

IN the position, that the intention of the testator is the law of devises, the intention meant is, an intention of the testator *legally*(a) to dispose of his property. This is the intention which the law will, if possible, fulfil. An intention, illegally to dispose of it, the law will frustrate. It should seem, a person cannot do more by his will than, with legal advice, he is able to do by a conveyance in his lifetime. He may, indeed, effect any given object *in a different way*, by his will; but the rules of law, which govern the *objects* themselves of a settlement of real property, are as applicable to a will as to a deed; and if an object is illegal, a will cannot attain it.

A will of lands, held for a freehold estate, is considered to be a species of *conveyance*. It will not, therefore, operate on lands in which the testator has no interest when he makes his will.(b) “Although,” observes Lord Mansfield, “as to personal estate, the law of England has adopted the rules of the Roman testament, yet a devise of lands in England is considered in a different light from a *Roman will. For a will, [*4] in the civil law, was an institution of the heir. But a devise in England is an appointment of particular lands to a particular devisee, and is considered in the nature of a conveyance by way of appointment; and upon that principle it is, that no man can devise lands which he has not at the date of such conveyance. It does not turn upon the construction of the statute 32 Hen. VIII., which says, that ‘any person *having* lands, &c., may devise;’ for the same rule held before the statute, where lands were devisable by custom.(c) It may, then, perhaps, be said to be *illegal*, prospectively to devise lands of inheritance, which the testator may agree to purchase after the making of his will; or prospectively to devise a freehold lease, which is not the property of the testator when

(h) 2 East, 42.

(i) 4 Ves. 341. See, also, *ibid*, 312, 42. (a) 2 Burr. 1112. 1 Atk. 377. 2 East,

329, 574; 2 Vern. 337.

(b) Cowp. 90. 2 Bl. C. 378.

(c) Cowp. 90.

his will is made; or, if the testator has a subsisting freehold lease, prospectively to devise a renewed(*d*) lease of the same lands. Terms of years, it may be added, are *personal* property, and the principle mentioned does not extend to them. It is in the power, therefore, of a testator, if he pleases, to devise (or bequeath) a lease for *years*, which he is not possessed of at the time he makes his will. As the devise is legal, it will be carried into effect.”(*e*)

SECTION II.

OF DEVISES IN PERPETUITY.

A SETTLEMENT in *perpetuity*, (which is any period longer than the time the law permits land to be unalienable,) is illegal; and cannot be effected by any assurance *whatever. The object of the law [*5] against settlements in perpetuity is, to facilitate the change (*f*) of landed property from one hand to another. A means to this end is, to prevent its being tied up, beyond a reasonable period, in the hands of persons unable to sell, or otherwise dispose of the whole estate in it: if the estate be in fee, then of the fee-simple; if for years, of the term. The law permits land to be made unalienable for a period, from the day the land is settled, of a life, or any number of lives, then in being, (*g*) and 21 years, and the farther period of nine months, or any additional time, within which a posthumous child must, if at all, be born. (*h*) Any longer period is, in law a perpetuity.

The point from which the law begins to count a perpetuity, is, it is apprehended, the day on which the property is settled. A will of lands seems to be a settlement made on the day of the testator's death; and from that day, it should seem, a perpetuity is, therefore, to be reckoned. But it appears, so strict and cautious is the law not to permit a perpetuity, that it is not sufficient if, in event, at the death of the testator, it turns out that the estate is alienable within the prescribed time; but the will, and not accident, must make it so: and if a limitation in a will is too remote when the will is published, the limitation is then, in its creation, void, and accident is not permitted to make it afterwards legal. (*i*)

It does not appear that the law against a perpetuity requires, that, within the limited time, the whole estate, in fee or for years, is to be vested in one person, and that he, singly, without the concurrence of other persons, is to have the right to alien it. It seems only to require that *the estate in fee, or the term, shall then be alienable; but [*6] whether by one person singly, or by many, as by a particular tenant and remainder-men, seems to be immaterial. The law against a perpetuity appears not to be infringed on, if, within the limited period, there are persons in existence who are entitled, in the case of a fee sim-

(*d*) See 6 Madd. Rep. 84.

(*e*) 11 Ves. 390. *Colegrave v. Manby*,
6 Madd. Rep. 72.

(*f*) 1 Eden, R. 416. 11 Ves. 137.

(*g*) Ibid. 134, 136.

(*h*) 7 T. R. 102, 103.

(*i*) *Lady Lanesborough v. Fox, Forrester*,
262.

ple, to alien the whole fee, and, in the case of a term of years, to alien the whole term. Consistently with the law against a perpetuity, a person seised in fee may legally devise to A., a person living, for life, remainder to A.'s first son unborn in tail, or to A. for life, remainder to A.'s first son unborn for life,^(j) remainder to B., a person living, in tail or in fee; or to A. for 500 years, in trust to pay the testator's debts and legacies,^(k) remainder to B., a person living, for life, remainder to B.'s first son unborn, for life, remainder to C., a person living, in tail or in fee. In neither of these instances, is a perpetuity created. In each, the fee simple is alienable within the prescribed period. In the first, by A. and A.'s first son, on his attaining 21; in the second, by A., A.'s first son at 21, and B.; in the third, by A., B., B.'s first son at 21, and C.

It may, in this place be observed, that a tenant *per auter vie* is incapable, by the nature of his estate, of creating a perpetuity. His own estate being only for the lives of persons in being, an estate of longer continuance cannot be created out of it.^(l)

In whatever way a testator may attempt to create a perpetuity; whether

- 1, By devising successive estates for life to persons unborn; or
- [*7] *2, By depriving a tenant in tail of his power to suffer a common recovery; or
- 3, By limiting an executory devise, which is not to take effect within the period prescribed by law; or
- 4, By means of a power; or
- 5, By a devise on trusts which would make the estate unalienable longer than the law permits—the intention of the testator cannot be carried into effect.

1. A person devised his lands "to the Draper's Company and their successors, in trust to convey the premises to his godson, Matthew Humberston, for life, and afterwards, upon the death of the said Matthew, to his first son for life, and so to the first son of that first son for life, &c.; and if no issue male of the first son, then to the second son of the said Matthew Humberston for life, and so to his first son, &c.; and in failure of such issue of Matthew, then to another Matthew Humberston for life, and to his first son for life, &c., with remainders over to other persons for their lives successively, and their respective sons, when born, for their lives; without giving an estate tail to any of them, or making any disposition of the fee."^(m) As this case is reported in Vernon, the Court, in giving judgment, said, "an attempt to make a perpetual succession of estates for life is vain, and not practicable; however, there ought to be a strict settlement made, and the intent of the testator followed, as far as the rules of law will admit of;" and it directed, "the settlement to be made, so that such who were in being, should be only tenants for life; but where the limitation was to be to a son not in being, there he must be made tenant in tail male."⁽ⁿ⁾ The words of the decree [*8] were, "that the Master do see a settlement made *of the residue of the trust estate, pursuant to the will of the testator, with limitations to the several parties named to be tenants for life in the

(j) Hay v. Earl of Coventry, 3 T. R. 83.

(k) Gore v. Gore, 2 P. W. 28.

(l) Low v. Burron, 3 P. W. 262.

(m) Humberston v. Humberston, 1 P. W. 332. 2 Vern. 737. See 1 Eden, 422.

(n) 1 Vern. 738. See 1 Eden, 422.

said will, and to the heirs male of their bodies, in strict settlement, according to the course of law; and if any of the parties who are named tenants for life have any issue male living, their names are to be inserted in the deed of settlement.”^(o) In *Thelluson v. Woodford*, Lord Alvanley noticed an inaccuracy in this decree. He said, “instead of the words, ‘to the heirs male of their bodies in strict settlement, according to the course of law,’ it ought to have been to the first and other sons, and the heirs male of their bodies successively. It is doubtful, whether the decree meant, that all the persons named, who were in existence at the time the decree was pronounced, should be made tenants for life. I cannot think that was the meaning. It must have meant all the persons named, who were in existence at the time of the testator’s death; for it cannot be contended, that the children born after the testator’s death, should, by the accident of being born before the decree, have estates for life given to them.”^(p)

Lewis Southcomb, being seised in fee in remainder, devised in these words, “to him the said Thomas, I do give my estate of Holcomb Burnel, during his natural life, as soon as it shall fall; but to his trustee in his behalf shall be committed the profits of the said estate, until he shall arrive at the age of 21 years; and after him I do give it to his eldest or any other son after him, during his natural life; and after them to as many of his descendants issue male, as shall be heirs of his or their bodies, down to the tenth generation during their natural lives.” Lord Ellenborough, who delivered the judgment of the court in this [*9] case, distinguishing it from *Robinson v. Robinson*, and the other cases determined on the same principle, observed, “in all these cases, expressions were used, denoting an intention that the lands should continue in the descendants of the first taker, as long as there were any, without specifying or marking what estates such descendants should take. But, in this case, the deviser has not used general terms, from whence an intent to give a descendible estate to the issue of the first devisee may be collected; but has, in express terms, narrowed the estates which the issue were to take to estates for life; and this, properly speaking, is not a case of a particular and a general intent, both of which cannot be effectuated, and where the one must give way to the other; but a case of single intent, to create a succession of estates for life, not warranted by any law.”^(q)

Cannon Southey devised “to Hugh Somerville and H. F. Luttrell in fee, in trust to and for the use of his great nephew, J. S. Somerville, for the term of ninety-nine years, if he should so long live, and after that term to the use of the first, second, third, and fourth sons of the said J. S. S., and the issue male of their bodies lawfully begotten, for the like term of ninety-nine years, as they should be in seniority of birth; and in default of such issue male in him or them, then to the use of his kinsman John Southey, and the issue male of his body lawfully begotten, for the like term of 99 years; and in default of issue male of him, then to his brother Robert Southey, and the issue male of him for the like term; and in default of issue male of him, to the deviser’s right heirs.” A question on this will having been sent out of Chancery for the opinion of

(o) 1 Eden, 422.

(p) 4 Ves. 333. 1 Eden, 423 (a.)

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(q) *Seaward v. Willock*, 5 East, 198.

the court of King's Bench, the following certificate was returned: "We are of opinion, that Hugh Somerville and *Henry Fownes [*10] Luttrell, took a fee-simple in the freehold and copyhold estates, according to their respective natures, and the absolute interest in the leasehold estates, devised to them by the will of the testator, Cannon Southey; subject however to the trusts of the said will; and that none of the subsequent limitations are limitations of uses executed by the statute. If the subsequent limitations had been limitations of uses executed by the statute, we are of opinion, that John Southey Somerville would have taken an estate for a term of 99 years, determinable with his life, in the freehold and copyhold estates of the testator, and in his leasehold estates, if they should so long continue; and that upon his death, his first son would take a like estate for a term of 99 years, determinable with his life, in the freehold and copyhold estates, and in the remainders of the leasehold estates; and that the several subsequent limitations to the second, third, and fourth sons of the said John Southey Somerville, and the limitations to the defendant John Southey, and his issue male, and the limitations to Robert and Thomas Southey, and their issue male, would be void; and that the other sons of the plaintiff, John Southey Somerville, would not take any estate under the testator's will." (r)

A person devised an estate, consisting of freehold and leasehold lands, "to his grandson John James Beard, and his assigns, so that he and they might receive and take the rents, issues, and profits thereof, to his and their use, during the term of 99 years, if he should so long live; and, immediately after his decease, then to the first son of his body, lawfully to be begotten, and his assigns, to receive and take the yearly rents thereof, to his and their own use, for the like term of 99 years, if he should [*11] happen so long *to live; and so on in tail male to such first son lawfully issuing for ever. And for want, and in default of such issue of such first son, then to the use and behoof of the second, and all and every other son and sons of John James Beard, severally, successively, and in remainder, one after another, as they should be in seniority of age, and priority of birth, and the issue male of such son or sons, lawfully issuing, for the like term of 99 years only (in case he should so long live;) and that such elder son, or the issue of such elder son, should have no greater estate than for the term of 99 years, determinable at his decease; and the elder son of such issue male always to take place before the younger of such son and sons, and the issue male of his and their bodies lawfully issuing. And in case there should be no issue male of the said John James Beard, nor issue of such issue male at the time of his death, or in case there should be such issue male at that time, and they should all die before they should respectively attain 21, without lawful issue male; then, there were similar limitations over to Joseph Beard (the brother of John James Beard,) and his sons and issue male." A case on this will was referred by the court of Chancery to the Judges of the King's Bench, who returned a certificate in these words: "This case has been argued before us, and we are of opinion, that John James Beard, the grandson and heir at law of John James the testator, took, under the said testator's will, an estate for 99 years, determinable with his life, in the freehold estate devised to him, in the first instance; and

also in the leasehold estates devised, if they should so long continue; and that, upon his death, leaving one or more sons, his first son will take an estate for 99 years, determinable with his life, in the freehold estates, and what shall then remain of the terms for which the leasehold estates are held. We are also of *opinion, that all the limitations subsequent and expectant upon the limitation to the first son of [*12] John James Beard are void.”(s)

2. In Sondag’s case, Merrick Sondag devised a house to Margaret, his wife, for life, “and, after her decease, my son William to have it, and if my son William marry, and have by his wife any male issue lawfully begotten of his body, then his son to have it; if he have no male issue lawfully begotten of his body, then my son Samuel to have the house;” and *totidem verbis*, to his son Thomas; then this clause is added:—“and my will and mind is, that if any of my sons, or their heirs male issue of their bodies, go about at any time to alienate or mortgage the house, that then the next heir to enter upon the house and enjoy it.” A common recovery was afterwards suffered by Thomas, who became seised in possession; and the question arose, if, by this means, he had forfeited his estate. It was resolved by the Court, “that no condition or limitation, be it by act executed, or by limitation of a use, or by devise in a last will, can bar tenant in tail from aliening by a common recovery.”(t)

This case has been followed(u) by *Mary Portington’s case*,(v) *Foy v. Hynde*,(w) *The Pewterer’s Company v. Christ’s Hospital*;(x) and the *King v. Burchell*.(y) In the last, Lord Northington said, “The only remaining question is, whether a man can give an estate tail, and, by annexing a proviso conditional not to alien, charge the estate upon alienation of tenant in tail, with such sum of money as he thinks proper? And I can no more think of *saying any thing upon that question, [*13] than if it were made one, whether, if a person should purchase an estate in fee-simple, it would be descendible to heirs female?”(z)

3. If a person is seised in possession,(a) and by his will he limits an *executory devise* in fee, the devise is not valid, unless the estate in fee is limited to become vested in the object of the devise within the period of a life or lives in being and 21 years, and the further period of nine months, or any other time, within which a posthumous child must, if at all, be born.(b) If the law were otherwise, a perpetuity might effectually be created; for an executory devise cannot be barred by any means whatever, not even by a common recovery.(c)

The law against a perpetuity applies also to executory devises by a termor for years. If a person has an estate for years in possession, and devises it, the devise is not valid, unless the term is limited to become vested in the object of the devise in a period less than the legal perpetuity.(d) As an executory devise of a term of years cannot be bar-

(s) *Beard v. Westcott*, 5 B. & A. 801. Turn. R. 25.

(t) 9 Co. 128.

(u) See, also, *Mainwaring v. Baxter*, 5 Ves. 458. *Roe v. Bedford*. 4 M. & S. 362.

(v) 10 Co. 35 b.

(w) Cro. Jac. 697.

(x) 1 Vern. 161.

(y) 1 Eden, 424; Amb. 379.

(z) 1 Eden, 434.

(a) See *Badger v. Lloyd*, 1 Ld. Raym. 523, 525.

(b) *Lady Laneborough v. Fox*, Cas. temp. Talb. 262. 7 T. R. 102.

(c) *Pells v. Brown*, Cro. Jac. 590. 2 Bos. & P. 327. 2 P. W. 55.

(d) *Love v. Windham*, 1 Lev. 290. 1 Mod. 50, 114.

red,(e) there is as much danger of a perpetuity, and consequently as much reason to limit the time within which it must take effect, as on a devise of an estate of inheritance.

4. The first Duke of Marlborough attempted to create a perpetuity, by means of a power in his will. He devised to trustees, "To the use of Harriet, Countess Godolphin, for life; remainder to William, Lord Ryalton, son and heir apparent of the Earl and Countess Godolphin, for life; remainder to his first and other sons in tail male; *re-[*14] mainder to all other the sons of Harriet, Countess Godolphin, successively in tail male; remainder to Robert, Lord Spencer, for life; remainder to his first and other sons in tail male; with several remainders over." And the following clause was added:—"And I do hereby empower and direct my trustees, on the birth of each and every son hereafter to be born of the said Lord Ryalton, and also of the said Harriet, Countess Godolphin, and also of the said Lord Spencer, and also of, &c., by deed to revoke and make void the respective uses limited to their respective sons in tail male; and in lieu thereof to limit the premises to the use of such sons for their lives, with immediate remainders to the respective sons of such sons, severally and respectively in tail male, according to the seniority of the said sons." This will became the subject of a suit in Chancery; and the Lord Keeper Northington, after many observations on the nature and impolicy of settlements in perpetuity, decreed, "that the clause of revocation and resettlement in the will of the Duke of Marlborough, is tending to a perpetuity, and, as repugnant to the estates limited, is void and of none effect."(f)

A person devised "all his manors, &c., at Stanstead, in the county of Essex (subject to certain annuities, &c.,) to his sons respectively for life, successively, with remainder to the first and other sons of such sons successively in tail male, with divers remainders over; and he thereby declared, that notwithstanding he had before limited the succession of his estate to his several sons according to their seniority, yet it was his will, and he thereby directed, that it should be lawful for each of them, as they should be respectively seised in possession, by will duly executed, to alter and change the course of succession aforesaid: and on failure of [*15] issue of his own *body, to appoint the next immediate remainder or succession of the premises to any other of the testator's sons, without regard to seniority, and that such son so appointed, should take the next immediate estate for life, with remainder over to support contingent uses, and to his first and other sons in tail male, as therein before limited to testator's eldest son, and his first and other sons. And the testator directed, that every of his sons, so to be appointed, should, when in actual possession of the premises, have the same power of appointing by his will the succession or next remainder, in default of issue male of his own body, to any other of testator's sons for life, and to his issue male, in manner aforesaid, so long as the testator should have more than one son living." On a bill brought to carry the trusts of the will into execution, Lord Northington directed, "That the trusts of the will and codicils should be performed and carried into execution, except so

(e) 8 Co. 96. 10 Co. 47 b, 52. 1 Leo. 93.

(f) *Duke of Marlborough v. Earl Godolphin*, 1 Eden, 404.

far as they relate to the alteration of estates-tail into tenancies for life, which is void by law.”(g)

5. Mr. Thellusson devised to trustees on the following long trust of accumulation:—

“ Upon trust that they the said Matthew Woodford, James Stanley, and Emperor John Alexander Woodford, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall from time to time during the natural lives of my sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, and of my grandson John Thellusson, son of my said son Peter Isaac Thellusson, and of such other sons as my said son Peter Isaac Thellusson now has or may have, and of such issue as my said grandson John Thellusson may have, and of such issue as any other sons of my said son Peter Isaac *Thellusson may have, and of such sons as my said sons [*16] George Woodford Thellusson and Charles Thellusson may have, and of such issue as such sons may have, as shall be living at the time of my decease or born in due time afterwards; and during the natural lives and life of the survivors and survivor of the several persons aforesaid; collect and receive the rents and profits of the manors or lordships, messuages, lands, tenements, and hereditaments hereinbefore by me devised and so to be purchased as aforesaid.”

The trustees are then directed, on the death of the survivor of the several persons during whose lives the accumulation is to go on, to divide all the estates devised to, and to be purchased by, the trustees, into three parts, and to convey one part in tail male to the eldest male lineal descendant of each of his three sons.

The trusts in this will were for *accumulation*, and being considered not to infringe on the law against a perpetuity, they were established.(h) But there is an inference from this case, that if an estate is devised in fee, or by a termor for years, on *any* trusts which *do* infringe on that law, the devise will be illegal, and consequently, cannot be carried into effect.

SECTION III.

OF A FEE ON A FEE.

It is not legal to devise a fee on a fee; as to A., and his heirs, and on the determination of that estate, to B. and his heirs.(i) In *Tilbury v. Barbut*, a person devised to his wife for life, and after her death, to his son John and *his heirs for ever; and in case of the death of [*17] John without any heir, then his real and personal estate, devised to his son John, to go and be enjoyed by his son Cornelius. Lord Hardwicke, in giving judgment in this case, said, “ In all devises of this kind, where there is a fee mounted on a fee, I dare say the testators mean heirs of the body; but unless there are words to restrain it to an estate-

(g) *Heath v. Heath*, 2 Eden, 330.

Ves. 89. *Aumble v. Jones*, 1 Salk. 238.

(h) *Thellusson v. Woodford*, 4 *Ves.* 227.

Grumble v. Jones, 11 Mod. 207. *Preston v.*

11 *Ves.* 112.

Funnel, Willes, 164.

(i) *Tilbury v. Barbut*, 3 Atk. 617. 1

tail, I am bound to construe it a fee in the first taker; and, consequently, as the testator has devised the whole to John, the second devise is void in law. I cannot go on a presumption that the testator did not know the law. If testators do not use proper words, the Court will supply them, where the intention of the testator is consistent with the rules of law; but where there is a fee mounted on a fee, it is a void devise in law.”(j)

SECTION IV.

OF A DEVISE TO AN HEIR AT LAW.

If a person devises to his heir at law, he cannot make him take by *purchase*, if he devises to him the *same estate* in the land, as, supposing the will not made, the heir would take by *descent*. To make an heir at law a purchaser, the ancestor must devise to him an estate which would not descend to him; as, supposing the testator to be seised in fee, an estate for years, for life, or in tail.(k) Under either limitation, the heir will take by purchase. Likewise in the case of co-heiresses, if the ancestor devises to them in joint-tenancy, they will take by purchase, for by descent they would be co-parceners.(l) So, if he devises to one co-heiress [*18] only, this one will take by purchase.(m) *In *Scott v. Scott*, the testator devised “to Henry, his eldest son, and to his heirs and assigns; nevertheless, in case he should die without issue, not having attained 21, then, from and immediately after his death, under age and without issue, to the testator’s son William, and the heirs male of his body,” with remainders over. The eldest son attained 21; and the Lord Keeper Henley determined, that the eldest son took by devise, as having under the will a different estate than would have descended to him, the one being pure and absolute, the other not.(n) To cause an heir at law to take by purchase, the *estate* which comes to him must, in some way, be altered by the devise; and therefore an heir will take by descent, although the devise to him is charged with the payment of a sum of money, or the debts of the testator;(o) for, in these cases, the *estate* devised is not varied.

The distinction between *purchase* and *descent* is important in its consequences to third persons. On this principle it seems to be, and in their favour, whenever a person devises to his heir at law the same estate he would otherwise have by descent, the law avoids the devise, notwithstanding any intention of the testator to the contrary, and makes the estate descend on the heir. Before the statute 3 Wm. & Mary, c. 14, it appears, in particular, to have been important to creditors, that an heir should take by descent, and not under a devise to him; but this statute (which is made perpetual by the 6 & 7 Wm. III., c. 14) makes devises void as against creditors. “The difference in effect,” says Sir William Blackstone, “between the acquisition of an estate by descent and by

(j) 3 Atk. 617.

(k) 2 Bl. C. 241, 242. 1 Salk. 233. See *Welby v. Welby*, 2 Ves. and B. 187.

(l) Anonymous, Cro. Eliz. 431. Beare’s case, 1 Leo. 112. 3 Lev. 127.

(m) *Reading v. Royston*, 1 Salk. 242. 2 Ld. Raym. 829.

(n) Amb. 383.

(o) *Haynworth v. Pretty*, Cro. Eliz. 862, 919. *Hedger v. Rowe*, 3 Lev. 137.

purchase, consists principally in these two points:—1. That, by purchase, the estate acquires a *new inheritable quality, and is descendible to the owner's blood in general, and not the blood [*19] only of some particular ancestor. For when a man takes an estate by purchase, he takes it not *ut feudum paternum*, or *maternum*, which would descend only to the heirs by the father's or mother's side; but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity, whereby it becomes inheritable to his heirs general, first of the paternal, then of the maternal line. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For if the ancestor, by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust for him) had any estate of inheritance vested in him by descent from (or any estate *pur auter vie* coming to him by special occupancy, as heir to) that ancestor, sufficient to answer the charge; whether he remains in possession, or hath alienated it before action brought; which sufficient estate is in the law called *assets*, from the French word *assez*, enough. Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or assets, by descent, from the covenantor; for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent." (p)

SECTION V.

OF AN INTENTION TO CHANGE THE COURSE OF DESCENT.

IT is not in the power of a testator to make an estate *descend* contrary to the legal course of descent. On a descent, *heirs on the father's side take precedence of heirs on the mother's side; [*20] and the intention of a testator cannot control this rule. If he devises to A. and his heirs on the part of his mother; at A.'s death, his heirs on his father's side will be entitled to the estate, notwithstanding the testator intended it should descend to his maternal heirs. (q) A testator may devise to A., and make B., the person who is the heir at law of A. on his mother's side, a *purchaser*; and, by this means, limiting the estate to B. and his heirs, he may effect his intention to make the estate descendible from B. in the line of the heirs of A. on his mother's side. But in this case it is plain he cannot be said to make the estate descend contrary to the legal course of descent. The land does not *descend* from A. to B. He makes B. a *purchaser*, and from him the estate will descend to his heirs according to law. It is legal to leave an estate to the family of the mother of A.; but then it is necessary to devise it to the maternal heir as a *purchaser*: an intention to make him take by *descent* is illegal, and cannot be effected.

(p) 2 Bl. C. 243.

(q) Co. Litt. 13 a. Walk. Desc. 148.

SECTION VI.

OF A DEVISE OF A TERM OF YEARS TO REAL REPRESENTATIVES.

A TERM of years is not a subject of *descent*, and a testator cannot make it so.^(r) The legal nature of it is, to devolve to the *personal* representatives of the owner, and not to his heirs.^(s) If a term is devised to A. and his heirs, at A.'s death it will belong to his executors; and no intention of the testator to the contrary can make the term *descend* to the *real* representative of A.^(t) A testator may, indeed, if he adopts a [*21] proper legal mode for the purpose, settle a *term of years in a way that real representatives may have the benefit of the term after the death of their ancestor; but then they will not take their interest in the term by *descent*. A term of years may be devised to A. for life, and, after the death of A., to B., who is the heir at law of A.; and the latter limitation (which will not be a remainder, for a *remainder* cannot be limited out of a term of years)^(u) as an executory devise, will be valid.^(v) So, likewise, A., possessed of a term, may devise it to B. for life, and after his death, to B.'s eldest son, unborn at the testator's death, for life; and this, also, will be a good *executory devise*.^(w)

SECTION VII.

OF A DEVISE OF A TERM OF YEARS IN TAIL.

As a term of years cannot be made to descend on real representatives, it follows it cannot be *entailed*. If A., possessed of a term, devises it to B. and the heirs of his body, this devise will be equivalent to a limitation to A. alone, or to A. and his executors. A., in his life time, may dispose of it as he pleases; and at his death, if undisposed of, it will belong to his personal representatives. The intention of the testator cannot make it descend to the issue of A.^(x) It has been said, that a term of years cannot be entailed, "for this plain reason, that no recovery can be suffered."^(y) The true reason seems to be, because the term cannot be made to descend on real representatives. An estate *pur auter vie* may be entailed,^(z) and the entail may be barred without a common recovery.^(a)

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| (r) 3 P. W. 31. 2 Atk. 580. | (x) Harg. Co. Litt. 20 a (5). Fearn. |
| (s) Co. Litt. 319 b. | 461. Fordyce v. Ford, 2 Ves. jun. 536. 1 |
| (t) 1 P. W. 433. Davis v. Gibbs, 3 P. | T. R. 596. Kinch v. Ward, 2 Sim. and St. |
| W. 26. 2 Atk. 580. Co. Litt. 46 b. | 409. |
| (u) 8 Co. 95. | (y) 2 Ves. jun. 539. |
| (v) Manning's case, 8 Co. 95. Lampet's | (z) 2 Vern. 185. |
| case, 10 Co. 47. | (a) 6 T. R. 292, 293. |
| (w) Cotton v. Heath, 1 Eq. Abr. 191, | |
| pl. 2. | |

*SECTION VIII.

[*22]

MORTMAIN.

THE Statute of *Mortmain*, also called *de Religiosis*, 7 Ed. I., s. 2, c. 1, makes it illegal to devise in mortmain; that is, to any corporation, lay or ecclesiastical, sole or aggregate.^(b) It enacts, "that no person, religious or other,^(c) whatsoever he be, presume to buy, or under the colour of gift or lease, or by reason of any other title, whatsoever it be, to receive of any man, or by any other craft or engine, to appropriate to himself any lands or tenements, under pain of forfeiture of the same, whereby such lands and tenements may anywise come into mortmain."^(d)

Under this statute, it appears illegal to devise to any corporation either in fee, *per auter vie*, or for years; or to devise to a corporation a lease *per auter vie*, or for years.

The Statutes of Wills, 32 Hen. VIII., c. 1, and 34 and 35 Hen. VIII., c. 5, authorise devises, excepting in mortmain. The words of the statutes are, "except to bodies politic and corporate."

The 7 and 8 Wm. III., c. 37, it should be added, empowers the crown "to grant to any person or persons, bodies politic or corporate, their heirs and successors, license to alien in mortmain; and also to purchase, acquire, take, and hold, in mortmain, in perpetuity or otherwise, any lands, tenements, rents, or hereditaments whatsoever, of whomsoever the same shall be holden."^(e)

SECTION IX.

CHARITABLE USES.

THE stat. 9 Geo. II., c. 36, makes it illegal to devise [*23] lands to *charitable uses*. It enacts, that "from and after the 24th day of June, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled, to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever; or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment, or settlement, of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds,) be and be made by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, (including the days of the execution and

(b) Co. Litt. 2 b.

(c) See *ibid*.

(d) See the Statute and notes in 1 vol. "Statutes of the Realm."

(e) See Harg. Co. Litt. 99 a (1).

death) and be enrolled in his Majesty's High Court of Chancery, within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor, (including the days of the transfer and death;) and unless the same be made to take effect in possession, for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

[*24] "Provided always, that nothing hereinbefore mentioned *relating to the sealing and delivering of any deed or deeds, twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements, and hereditaments, or any transfer of any stock, to be made really and *bond fide*, for a full and valuable consideration, actually paid at or before the making such conveyance or transfer, without fraud or collusion.

"And be it further enacted, that all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time, from and after the said 24th day of June, 1736, be made in any other manner or form, than by this act is directed and appointed, shall be absolutely and to all intents and purposes null and void.

"Provided always, that this act shall not extend or be construed to extend, to make void the dispositions of any lands, tenements, or hereditaments, or of any personal estate, to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two Universities within that part of Great Britain called England; or any of the colleges or houses of learning within either of the said

[*25] Universities; or *to or in trust for the colleges of Eton, Winchester, or Westminster, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester, and Westminster."

This statute is often, but erroneously, called the Statute of Mortmain. The statute of Mortmain is the 7 Edw. I., st. 2, c. 1, also called *de Religiosis*. The act of Geo. II. is not, in any sense, a mortmain act. It neither prohibits nor authorises alienation in mortmain; in other words, to a *corporation*. By the common law, it was legal to *devise to individuals* to charitable uses. The statute of Geo. II. makes such devises illegal. This was its object; it declares void any alienation to charitable uses, if not made by *deed*.(f)

(f) See 4 Ves. 427, 428. 1 Jac. Rep. 183.

The statute includes devises for charitable purposes, by means of a *trust for sale*.(g) In the *Attorney General v. Lord Weymouth*, in which there was a trust for sale, it was said by Lord Hardwicke: "If Sir John James, instead of devising the surplus, had said, I charge my real estate with the payment of 1000*l.* to a charity, it would certainly have been void by the express words of this act. And will it not then be absurd to say, he shall be able to give his whole real estate to be turned into money for the benefit of a charity?"(h) In the *Attorney General v. Tyndall*, a person devised "all her freehold and leasehold estates to trustees, upon trust to sell and dispose of the same; and out of the monies arising by such sale, part to be laid out in the purchase of a competent piece of ground for erecting and building an alms-house, in the parish of St. James, in the city of Bristol, *and the other part to be laid out in the building, erecting, and furnishing the said [*26] alms-house; the residue of her estate to be laid out in the purchase of lands in the names of trustees, in trust, out of the rents and profits, to pay certain weekly stipends to twenty poor persons whom she had before appointed to live in the said alms-house." On an appeal from the Master of the Rolls, it was determined that this devise could not be carried into effect.(i) The devise of the leaseholds being void, they fell into the residue; and the decree at the Rolls declared, that although the devise of the residue could not be supported to purchase a scite for the alms-house, yet that it might to build the alms-house, if ground were given to the trustees for the purpose. This part of the decree was founded on the authority of the *Attorney General v. Bowles*,(j) in which Lord Hardwicke had determined, that the word '*erect*' did not necessarily import a direction to *purchase* land, and that if the trustees could get a piece of ground by the *gift* or generosity of any person, not by purchase, they might build on the land so acquired, notwithstanding the statute. Lord Northington, by reversing the decree at the Rolls, overruled that interpretation of the word '*erect*.' In the *Attorney General v. Parsons*, Lord Eldon observed; "I agree with the late cases, which go a great way to establish, that the Court cannot put such a construction upon the word '*erect*,' as was put upon that word in former cases; and that, *prima facie*, the testator must be taken to mean by that word, that land shall be *bought*. I think the good sense is with the late cases, requiring that the testator himself should manifest his purpose to be sufficiently answered, if the trustees could hire or beg land, according to the expressions in the different cases."(k)

*The statute extends also to devises subject to a *charge* for charitable purposes.(l) In *Arnold v. Chapman*, there was a [*27] devise of a copyhold estate to one Chapman, he causing to be paid to the testator's executors 1000*l.*; and, after payment of debts and legacies, the residue and remainder of all the testator's real and personal estate were bequeathed to the governors of the Foundling Hospital, and their suc-

(g) *Attorney General v. Lord Weymouth*, Amb. 20. *Attorney General v. Tyndall*, 2 Eden, 207. Amb. 614.

(h) Amb. 25.

(i) 2 Eden, 207. Amb. 614.

(j) 2 Ves. 547. See also *Vaughan v. Farrer*, *ibid.* 182

(k) 8 Ves. 191. See also 9 Ves. 544. 2 Eden, 215.

(l) *Arnold v. Chapman*, 1 Ves. 108. *Jackson v. Hurlock*, 2 Eden, 263. Amb. 487. *Wright v. Row*, 1 Bro. C. C. 61.

cessors for ever. "Had the testator," said Lord Hardwicke, "devised the copyhold estate on condition to pay 1000*l.* to the governors, it would have been void by the statute. He has taken another method, by including it in a residuary bequest of real and personal estate: and it is said that they can take, because, by giving it to the executors, he has made it part of the personal estate; and he may, undoubtedly, if he pleases, turn it into personal estate; but it must be for lawful purposes. But here the act intervenes; which, if this was allowed, would be easily evaded; for it would be only directing the real estate to be sold, and the money to be given to the charity; and in the case of James, (*m*) this was determined to amount to a devise of the land itself: because all charges, trusts, sums of money, &c., devised out of land to a charity, are made void by the act." (*n*)

Devises *in trust to convey to charitable uses* are also within the statute. (*o*)

The statute farther includes devises for any *public purpose permanently beneficial*, although in strictness, perhaps, it cannot be called a *charity*. (*p*) In *Jones v. Williams*, *there was a bequest of [*28] 1000*l.*, to arise by sale of the testator's real estate, "for the purpose of bringing spring water from St. Arvans, or elsewhere, to the town of Chepstow, for the use of the inhabitants, for ever;" and it was decided that this devise was within the statute of charitable uses, and therefore void. (*q*)

SECTION X.

OF THE STATUTE OF ACCUMULATION.

THE will of Mr. Thellusson occasioned the Statute of Accumulation, 39 and 40 Geo. III., c. 98. It recites, "Whereas it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained;" and enacts: "That no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise soever, settle or dispose of any real or personal property, so and in such manner, that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors; or the term of 21 years from the death of any such grantor, settlor, devisor, or testator; or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mère*, at the time of the death of such grantor, devisor, or testator; or during the minority,

(*m*) *Attorney General v. Lord Weymouth*, Amb. 20.

(*n*) 1 Ves. 110.

(*o*) *Edwards v. Pike*, 1 Eden, 267. *Doe v. Aldridge*, 4 T. R. 264. *Doe v. Wright*, 2 B. & A. 710.

(*p*) *Jones v. Williams*, Amb. 651. *Howes*

v. Chapman, 4 Ves. 542. *Townley v. Bedwell*, 6 Ves. 194. *Doe v. Aldridge*, 4 T. R. 264. See also, on the extent of the word "Charity," *Morice v. Bishop of Durham*, 10 Ves. 522. 1 Jac. Rep. 184.

(*q*) Amb. 651.

or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, *will or other assurances [*29] directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated: and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property, so directed to be accumulated, shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this act, go to, and be received by, such person or persons as would have been entitled thereto, if such accumulation had not been directed.

“Provided always: That nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons; or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise; or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this act had not passed.”

On this statute it has been determined, on a devise of an estate to be sold, the money to arise from the sale to be invested in the public funds, with this proviso;—“That so much of the dividends, or interest, as shall accrue due to Elizabeth Mary Griffiths, during the life of John Griffiths, her husband, shall not, during that time, be paid to her, or to any person for her use, but the same shall be, during his life, invested by the trustees in the public funds, on government or real securities; and that the dividends, or interest, which shall accrue thereon, shall be added to, and accumulated with, the capital; and, on *the decease of the [*30] said John Griffiths, the said capital, with the accumulations thereof, shall be forthwith transferred, or paid, to Elizabeth Mary Griffiths;” that, on the true construction of the act, “the accumulation directed during the life of the husband, if not in fact going beyond 21 years, was good, and if it did in fact continue beyond that period, yet, on the true construction of the act, the direction was good, *pro tanto*; and during the period of 21 years the rents and profits are well directed to accumulate; leaving it to the law to determine what is to become of the rents and profits to accrue between the end of the 21 years and the expiration of the life: and, of course, to determine, also, what is to become of the interest of the fund created by the accumulation permitted for the period of 21 years.”(r) On a bequest in these words. “To my niece, Mary Ann Williams, the sum of 5000*l.*, during life; after which to her children, for their education and maintenance, and to be equally divided among them, on their arriving at the age of 21 years;” it was determined, the accumulation was void only for the excess, and good for 21 years, although the legatee in this case, was not born at the death of the testator. The Master of the Rolls, Sir William Grant, observed: “Suppose, instead of a life, with regard to which there might be some uncertainty, the testator has said, the accumulation should continue 24 years;

(r) *Griffiths v. Vere*, 9 Ves. 127, 131.

it would be good for 21 years, within that determination. [Griffiths v. Vere."] The decree accordingly directed the accumulation for 21 years from the death of the testator.^(s)

[*31]

•CHAPTER III.

OF THE MEANS TO COLLECT THE INTENTION.

THE means, at law and in equity,^(a) to collect the testator's intention, are *the words of the will*, free of conjecture.^(b)

It has been forcibly observed by Mr. Justice Tracy, that "no regard is to be had to expressions before or after making of the will, which possibly might be used by the testator on purpose to conceal or disguise what he was doing, or to keep the family quiet, or for some other secret motives and inducements; but the will that must pass land must be in writing, and must be determined only by what is contained in the written will."^(c) To the same effect is the language of Lord Mansfield: "Guesses may be formed, but that is not enough. Perhaps, *quod voluit non dixit*. We cannot make a will for the testator."^(d) So, Mr. Justice Wilmut: "The intention of a testator is to be collected from the whole of his will, *ex visceribus testamenti*; so as to leave the mind quite satisfied about what the testator meant; and as a will of lands must be in writing, such collection of the testator's intention must be founded upon the writing itself."^(e) And Lord Kenyon: "the general rule which is laid down in the books, and on which alone courts can with any safety proceed in the decision of questions of this kind is, to collect [*32] the testator's intention from the words which he has used in

"his will, and not from conjecture."^(f) Again: "In construing wills, we must take into consideration the short hints of the deviser, in order to discover his intention. To be sure, if the objection, *voluit sed non dixit*, had occurred, it could not have been got over. We could not have inserted words in the will, which would have varied the construction of those used, even if we thought that the deviser intended to have used them."^(g) To the same effect the Lord Keeper Northington: "The ruling principle in the construction of wills is, that the court is bound to find out the intention of the testator, if it be possible so to do, however inartificially the will may be expressed. But this intention must be discovered from the words of the will itself, and not from intrinsic circumstances; and the court must proceed upon known principles and established rules, not on loose conjectural interpretations, or by considering what a man may be imagined to do in the testator's circumstances."^(h)

The distinction has not been found in terms, but it appears to be authorised by the cases: if the words of a will fail to disclose an intention,

(s) Longdon v. Simson, 12 Ves. 295.

(a) 2 Atk. 373. 1 Eden, 39, 94.

(b) 5 Co. 68 b. 2 Vern. 625. 1 Salk.

234. 1 Eden, 94. 2 M. & S. 455, 458.

(c) 2 Vern. 625.

(d) Doug. 78.

(e) 3 Barr. 1541.

(f) 3 T. R. 85.

(g) 5 T. R. 323.

(h) 1 Eden, 43.

collateral evidence is inadmissible to *discover* it; but if an intention is discovered, collateral evidence is admissible to *explain* it.(i)

The words of a will may fail, in a degree or totally, to disclose an intention, by being *obscure* or *unintelligible*.

The Lord Cheyney's case is an example of *obscurity* in a will. Sir Thomas Cheyney devised "to Henry his son, *and to the heirs of his body, the remainder to Thomas Cheyney of [*33] Woodley, and to the heirs of his body, on condition that he or they, or any of them, shall not alien, discontinue, &c." It became a question, if witnesses might be received to prove that it was the intent and meaning of the deviser to include his son and heir within these words of the condition, "he or they," or only to restrain Thomas Cheyney of Woodley, and his heirs male of his body; and it was resolved that the evidence could not be received.(j) In *Castledon v. Turner*, there is also an instance of *obscurity* in a will. The words of the will were: "I bequeath my lands to my wife Alicia, during her life; and after her decease, I give the lands to Margaret Dinton, niece to my said wife. *Item*. I give the use of 500*l.* stock, for and during her natural life; but after her decease, I give the 500*l.* among the brothers and sisters of my said wife." On the question to whom the word "*her*" in the will applied, Lord Hardwicke stated, that it could not be explained by evidence, and said that it must be determined by the will itself. On the words, he was of opinion the wife was entitled to the legacy.(k)

The cases in the margin(l) appear to be farther instances of *obscurity* in wills.

In the following cases are examples of *unintelligible* words in wills.

In *Baylis v. The Attorney General*, on a bequest "to the ward of Breadstreet, according to Mr. his will;" Lord Hardwicke, in giving judgment, said: "There are instances where this Court has admitted parol evidence to ascertain the person intended by the testator, where he *has been mentioned only by a nickname;(m) or where there [*34] have been two persons who have had the same christian and surname; but I do not remember any case, where the Court has gone so far as to allow parol evidence of the intention of a testator, where there is only a blank;" and, in the case before him, his lordship would not permit the evidence to be read.(n) In *Hunt v. Hort*, the testatrix devised her houses in town and at Richmond to her niece Dame Margaret Hort, and Richard Baker, in trust for sale; she then gave certain pictures specifically, and the will proceeded, "my other pictures to become the property of Lady ."(leaving a blank.) The testatrix made her niece Harriet Hunt her residuary legatee, whom she recommended to the care of Lady Hort, and appointed Lady Hort and Richard Baker her executors. Lord Thurlow, after consideration, said, "he could not sup-

(i) The common position, that collateral evidence is admissible to explain a *latent*, and is inadmissible to explain a *patent ambiguity* in a will (4 M. & S. 556,) seems inadequate to express this distinction. There appears, besides, to be an incorrectness, in the position mentioned; for, clearly, a *patent ambiguity* in a will may be explained by evidence; as in *Abbot v. Massie*, 3 Ves. 148.

(j) 5 Co. 68.

(k) 3 Atk. 257.

(l) Sir Litton Storde v. Lady Russell, 2 Vern. 621. Minshall v. Minshall, 1 Atk. 411. Ulrich v. Litchfield, 2 Atk. 372. Doe v. Meakin, 1 East, 456. Doe v. Brown, 11 East, 441.

(m) Dowset v. Sweet, Amb. 175.

(n) 2 Atk. 239.

ply the blank by parol evidence; and that where there is only a title given, it is the same as if it was a total blank.”(o)

There are many cases which appear fully to authorize the position, that if an intention is discovered in a will, collateral evidence is admissible to explain it.(p)

In the cases which follow, collateral evidence was admitted of the person intended to be the devisee.

A testator bequeathed “to Mr. James Massie of St. Martin’s-lane, and W. G., 50*l.*, as executors: pint silver mug and all my china to Mrs. G., and 10*l.* for mourning.” Mr. and Mrs. Grcgg claimed under the description of Mr. G. and Mrs. G. The Master refusing evidence that they were the persons intended, they excepted to the report.

[*35] *Lord Loughborough: “The Master should receive evidence, but legal evidence, to prove who Mrs. G. is. I do not mean to tell the Master what evidence he is to receive.”(q) A testator bequeathed, “to

Price, the son of Price, the sum of 100*l.*” A bill was filed for the legacy. No other person claimed it. In support of the plaintiff’s claim, evidence was read, from which it appeared, that he was the son of a niece of the testator; that his father’s and grandfather’s name was Price; that the testator had no other relation of that name; that he lived on terms of affection with the plaintiff, contributed to his maintenance, placed him with an attorney, and paid the duty on that occasion; and that the testator said, he had or would provide for the plaintiff, and that he had left him something by his will. On the part of the defendants, the executors, it was said, “the residuary legatees are not satisfied of the plaintiff’s right. The question is, whether he or his father is intended. It has been determined, that a legacy to Lady

is void. Master of the Rolls: “This is quite a different case. This is only that the testator did not know the christain name. I am perfectly satisfied by this evidence; but if the executors insist upon an inquiry and advertisement, they must have it; but after this evidence, and the length of time that has elapsed without any other claim, there can be no doubt. The plaintiff’s father can have no claim. There is positive evidence that the testator contributed to the plaintiff’s maintenance, placed him with an attorney, said he would provide for, and had left him something by his will.”(r) A testator gave “an equal share of his real estate to his two sons James and Charles Rivers.” Lord Hardwicke stated the question to be, “whether, as it appears that James and Charles are

[*36] illegitimate children *of the testator, this is such a description of their persons as well entitle them to take under the will? In the case of a devise, any thing that amounts to a *designatio personæ* is sufficient; and, though in strictness they are not his sons, yet, if they have acquired that name by reputation, in common parlance they are to be considered as such. It has been said, the testator has likewise made a mistake in their names, and therefore they cannot take; but the law is otherwise; for if a man is mistaken in a devise, yet if a person is clearly

(o) 3 Bro. C. C. 311.

(p) See 1 Salk. 7; 6 Mod. 199; 3 Keb. 49; 3 Lev. 71; 1 Ves. & B. 470. 1 Madd.

Rep. 437, 438, 439. Gladding v. Yapp, 5 Madd. Rep. 56.

(q) Abbot v. Massie, 3 Ves. 148.

(r) Price v. Page, 4 Ves. 680.

made out, by averment, to be the person meant, and there can be no other to whom it may be applied, the devise to him is good.”^(s) A person bequeathed 500*l.* to Catherine Earnley. The name of the person who claimed this legacy was Gertrude Yardley; and it was insisted by her and admitted, that no person named Catherine Earnley claimed the legacy. By evidence, it appeared that the testator’s voice, when he made his will, was very low, and hardly intelligible; that the testator usually called the legatee of this 500*l.*, Gatty, which the scrivener who took instructions for drawing the will, might easily mistake for Katty; and that the scrivener, not well understanding who the legatee was, or what was her name, the testator directed him to I. S. and his wife, to inform him farther, who afterwards declared, that Gertrude Yardley was the person intended. It was moreover proved, that the testator in his life-time had declared he would do well for her by his will. It was objected, that the Statute of Frauds requires a will to be in writing, and a will in writing, giving a legacy to Catherine Earnley, cannot be a writing to entitle Gertrude Yardley to the legacy, for that both the christian and surnames are entirely different; and by the same reason it may be maintained, that a legacy given to A. B. is a good legacy to C. D. But *the [*37] Master of the Rolls determined, “that the legacy was a good legacy to Gertrude Yardley, although the same was given by the will to Catherine Earnley.”^(t) A testator bequeathed 100*l.* to “John and Benedict, sons of John Sweet.” John Sweet had two sons only, James and Benedict. On the question, whether James Sweet should take under the description of John, it was held clearly that he should, even if it stood on the will, and the other fact only; but it was proved the testator used to call him Jackey.^(u) A person, by her will, gave one-sixth of the residue of her personal estate, in trust to put out at interest, and the interest to be paid to her niece Mary Bradwin, for life; and after her death one moiety of the one-sixth to be paid to the said Mary Bradwin’s grand-children, the children of her daughter Mary, at their age of twenty-one; and the other moiety to be paid to Anne, the daughter of her said niece Mary Bradwin.” Mary Bradwin, the niece, had two children; Mary, who was never married, and Anne, who married Robert Barnes, and died in the life-time of the testatrix, and before the making of her will, leaving two children, William and Robert Barnes. On a bill, that one moiety of the money might be paid to the plaintiff Mary, and the other moiety to the two Barnes’s on their attaining twenty-one, on the foundation that the testatrix so intended, but, by a mistake of names, had given a moiety to the children of Mary, who never was married, and the other moiety to Anne, who had died before the will was made, leaving the children; it was proved that the testatrix was eighty years old at the time of making her will, and lived in Derbyshire, and that Mary Bradwin her niece, and her family, lived at St. Alban’s, in Hertfordshire; and that the testatrix had *never seen her niece’s children or grand-children. The Master of the Rolls decreed the mo- [*38] ney to be paid to the plaintiffs, according to the intention.^(v)

The cases cited in the margin^(w) are farther instances, in which col-

(s) *Rivers’ Case*, 1 Atk. 410.

(t) *Beaumont v. Fell*, 2 P. W. 141.

(u) *Dowset v. Sweet*, Amb. 175.

(v) *Bradwin v. Harpur*, Amb. 374.

(w) *Hampshire v. Pearce*, 2 Ves. 216.

Hussey v. Berkeley, 2 Eden. 194. Del

lateral evidence has been admitted in explanation of *the person intended to be the devisee*.

In the cases which follow, collateral evidence has been admitted in explanation of various other parts of a will.

A person devised to one Hodgson several closes, paying 100*l.* he owed to J. S., and 100*l.* he owed by bond to one Shaw. It appeared that the 100*l.* due on bond was not due to Shaw, but to a Mrs. Fitch; and evidence to this effect was offered and received; the Lord Chancellor declaring "he saw no hurt in admitting of collateral proof to make certain the person or the thing described."^(x) A testator bequeathed to his wife, Elizabeth Mildmay, the interest and proceeds of 1250*l.*, "part of my stock in the 4 *per cent.* annuities in the Bank of England, for and during the term of her natural life, together with such dividends as shall be due on the said 1250*l.* at the time of my decease;" and, after the decease of his wife, he bequeathed the said stock to several of his relatives, always calling it his 4 *per cent.* stock. There was evidence, that the testator had no such stock at the date of his will, having previously sold it all, and invested the produce in *Long annuities*; and this evidence was received. The Master of the Rolls, in giving judgment, observed, "the principles of the cases determined are so clear, that I have no difficulty [*39] in saying, that a latent ambiguity arises from the testator's circumstances *not being sufficient to meet the legacy he had given. There is no ambiguity upon the will. Then the question is, whether the Court is not bound, by every rule, to admit evidence where there is no ambiguity upon the will. In this case, the evidence is to prove, not that it is a mistake, for that is clear, but to show how that mistake arose; and when one reads what the case was, it would be unjust to refuse to rectify a mistake so clearly and naturally accounted for. The testator had instructed a broker to sell out his 4 *per cent.* stock; and the identical money produced by that sale was invested in this *Long annuity*. Nothing is now doubtful. It is clear the testator meant to give a legacy, but mistook the fund. He acted upon the idea that he had such stock."^(y) In *Goodtitle v. Southern*, the defendant claimed under the following devise in the will of Richard Southern: "I give and devise all that my farm, lands, and hereditaments, called Trogues-farm, situate within the parish of Darley, in the county of Derby, now in the occupation of A. Clay, unto my brother, John Southern, and to his heirs and assigns for ever." The lessor of the plaintiff claimed under the residuary clause in the same will, which, it was admitted, would entitle him to the premises in question, provided they did not pass to the defendant under the above devise. On the part of the lessor of the plaintiff, it was proved that Trogues-farm was in the occupation of A. Clay; but the closes in question were not in his occupation, but in the occupation of one Marsden; and in order to show that they were not parcel of Trogues-farm, and that the testator, Richard Southern, did not take them as such, the will of one Houghton was produced, which contained the following devise to Richard Southern; "Also all that piece or parcel of ground si-

Mare v. Rebello, 3 Bro. C. C. 446. *Parsons v. Parsons*, 1 Ves. jun. 206. *Smith v. Coney*, 6 Ves. 42. *Swaine v. Kennerley*, 1 Ves. & B. 469.

(x) *Hodgson v. Hodgson*, 2 Vern. 593.

(y) *Selwood v. Mildmay*, 3 Ves. 306.

tuates in the liberty of Wansley, and in the parish of Darley, [*40]
 *commonly called, or known by the name of, Trogues, [*40]
 otherwise Trough's-pasture; and also all those two closes of land, situate
 at the bottom of the pasture called Trogues, otherwise Trough's-pasture,
 called by the name of the Dale-closes." Richard Southern, when he
 became entitled to this land under Houghton's will, let the two closes to
 Marsden; and evidence was offered of payment of rent by Marsden to
 Richard Southern, in order to show that Richard Southern knew in
 whose occupation the land was. On the part of the defendant, a notice
 to quit was proved, which had been given to Marsden by Richard
 Southern, a few months before the time of making his will; which notice
 was in these terms: "I do hereby give you notice to quit and deliver up
 the possession of all my lands belonging to, and called, Trogues-farm,
 situate in the parish of Darley, now in your possession, on or before
 Lady-day next." This evidence was objected to by the counsel for the
 plaintiff, but was accepted on the trial. The point of its admissibility
 was afterwards argued in the court of King's Bench, where it was de-
 cided the evidence was admissible. "Parcel or no parcel," said Lord
 Ellenborough, "is always a question of evidence for a jury; and in the
 same manner it was competent to show here, if there was any doubt, that
 the two closes were parcel of Trogues-farm, by which name the thing
 devised was sufficiently ascertained." And by Mr. Justice Bayley:
 "The testator devises 'all his farm called Trogues-farm;' and it was
 competent to show by evidence of what parcels that farm consisted." (z)

The cited cases (a) are farther instances in which collateral
 *evidence has been admitted in explanation of the intention [*41]
 in a will.

The effect of evidence, admitted in explanation of a will, necessarily
 depends on the circumstances it discloses. The evidence, when admit-
 ted, may amount to nothing, as in *Hussey v. Berkeley*; (b) or, as in
Thomas v. Thomas, (c) it may involve the testator's intention in so much
 doubt, as to set aside the particular devise altogether, in favour of the
 heir at law.

It further appears, if the evidence offered in explanation of a will
 tends to have no legal effect, it is irregular to accept it. (d)

It remains to remark, that, in *all* cases, it is the intention, which the
 words of the will express, that the law carries into effect. Collateral
 evidence is not permitted to introduce an intention on the words of a
 will, that, with the explanation the evidence affords, is not expressed by
 those words. (e)

(z) 1 M. & S. 299.

(a) *Pendlestone v. Grant*, 2 Vern. 517.
Fonnerau v. Poyntz, 1 Bro. C. C. 472.
Baugh v. Read, 1 Ves. jun. 259. *Down v.*
Down, 7 Taunt. 343. *Doe v. Pigott*, ib. 554.
 (b) 2 Eden, 194.

(c) 6 T. R. 671.

(d) *Doe v. Oxenden*, 3 Taunt. 147. *Doe*
v. Greening, 3 M. & S. 171. *Doe v. Lyford*,
 4 M. & S. 550.

(e) See 1 Ves. & B. 462. *Swaine v.*
Kennerley; ibid. 469; also, 9 East, 462.

[*42]

*CHAPTER IV.

TECHNICAL WORDS NOT REQUIRED IN A WILL.

THE words of a will are the means to collect the intention; and, as a testator is not supposed^(a) to be acquainted with legal language, the law neither requires nor expects^(b) *technical*^(c) words in a will.

If it is the intention,

Land will pass under the word, "effects;"^(d) or "property;"^(e) or the words "personal estate;"^(f)

The word *legacy* will apply to *real* property;^(g)

A *fee-simple* will pass by a devise "for ever;"^(h) by a devise of "all I am worth;"⁽ⁱ⁾ by a devise "of my property;"^(j) by a devise in the words: "A. B. I make my sole heir;"^(k) by a devise "to A., B. and C. and the survivors and survivor of them, and the executors and administrators of such survivor;"^(l) by a devise in the words: "I devise all my lands, tenements, and hereditaments, to A. Item, I devise all my goods and chattels, money and debts, and whatever else I have not before disposed of, to A."^(m)

These examples are ample to prove that *technical* words are not required in a will.

[*43]

*CHAPTER V.

TECHNICAL FORMS OF CONVEYANCE NOT REQUIRED IN A WILL.

TESTATORS are supposed to be *inopes consilii*; and, therefore, if the substance of their wills is legal, although a will of land is a conveyance,^(a) the technical *forms* of conveyance are not required of them.^(b)

A testator cannot place the freehold in abeyance;^(c) nor limit a fee on a fee;^(d) nor, possessed of a term of years, can he limit a remainder^(e) of it. But he may limit a freehold estate to commence at a future

(a) 2 Atk. 580.

(b) 5 T. R. 731.

(c) 1 Saik. 237. 6 Mod. 110. 5 T. R. 731. 2 East, 39. 2 Atk. 575.

(d) Doe v. White, 1 East, 38. Doe v. Lainchbury, 11 East, 290. Den v. Trout, 15 East, 393. See also Cowp. 307. Camfield v. Gilbert, 3 East, 532. Doe v. Dring, 3 M. & S. 448. Doe v. Hurrell, 5 B. & A. 18.

(e) Doe v. Lainchbury, 11 East, 290. See also, *ibid.* 524. Doe v. Langlands, 14 East, 370. Roe v. Pattison, 16 East, 221. Noel v. Hoy, 5 Madd. 38.

(f) Doe v. Tofield, 41 East, 246.

(g) Hope v. Taylor, 1 Burr. 269. Hardacre v. Nash, 5 T. R. 716. See also Doug. 39. 2 P. W. 186.

(h) Doe v. Roper, 11 East, 518.

(i) Huxtep v. Brooman, 1 Bro. C. C. 437. See 14 East, 373.

(j) Roe v. Pattison, 16 East, 221. Doe v. Langlands, 14 East, 370.

(k) Beaucherk v. Dormer, 2 Atk. 308. See Jackson v. Kelly, 2 Ves. 285, and 3 Keb. 49.

(l) Rose v. Hill, 3 Burr. 1881; see *ibid.* 1885.

(m) Hopewell v. Ackland, 1 Saik. 239.

(a) Cowp. 306.

(b) 6 Mod. 110. Ridout v. Dowding, 1 Atk. 419.

(c) Butl. Co. Litt. 216 a (2).

(d) Tilbury v. Barbat, 3 Atk. 617. Cra. Eliz. 591.

(e) 8 Co. 95.

day;(f) the fee-simple to A., and on a contingency, to B.:(g) and, possessed of a term of years, he may devise it to A. for his life, and, after his death, to B.:(h) provided, in each instance, the devise does not infringe on the law against a perpetuity.(i) Neither of the three devises is good by the common law of conveyances; but, on the principle that a testator is supposed to be unacquainted with technical form, the intention in these devises not being illegal, their form is dispensed with. They are called *executory* devises. They are devises which the law will *execute*; in other words, carry into effect, according to the testator's intention.(j) But in supplying their form, the law, it should seem, permits *these devises to have no farther effect than the technical limitations would have, which, with legal advice, the [*44] testator might have put into his will.

The law very much favours freedom of alienation, and gladly unfetters long settlements, whenever it is able to do so. To this end, it invariably inclines to construe a limitation over to be a *contingent remainder* rather than an *executory devise*. Executory devises are not favoured in the exposition of wills, for this reason, that they cannot be barred by any means whatever; and, consequently, they present the greatest impediment to alienation. Contingent remainders are easily destroyed. Whenever, therefore, a limitation over can take effect as a contingent remainder, it is never construed to be an executory devise.(k)

*CHAPTER VI.

[*45]

ANY WORDS WILL EFFECT A LEGAL INTENTION.

It has been seen that technical words are not required in a will. Any words will effect a legal intention. Provided the testator makes a legal disposition of his property;—the position is not too general,—it is no matter what words he uses for the purpose.

This position it may be useful to exemplify in words of *property*; in words of *estate* in property; in words *naming the devisee*.

1. *If it is the intention,*

Land will pass under the words "*rents of land*;"(a)

By the word "*house*," the *outbuildings* used with it will pass although themselves not named;(b)

A *leasehold* estate will pass under the word "*farm*;"(c)

By the words "*freehold houses in A.*," the testator having none but *leasehold* houses there, the *leasehold* will pass.(d)

(f) *Pay's Case*, Cro. Eliz. 878.

(g) *Pells v. Brown*, Cro. Jac. 590. *Doe v. Wetton*, 2 Bos. & P. 324. *Right v. Day*, 16 East, 67.

(h) *Methew Manning's Case*, 8 Co. 95. *Lampet's Case*, 10 Co. 47.

(i) 7 T. R. 102.

(j) 2 Bl. C. 172. See 1 Ves. jun. 255.

(k) 3 T. R. 765. 2 Bos. & P. 295, 327.

(a) *Kerry v. Derrick*, Cro. Jac. 104. *South v. Alleine*, 1 Salk. 228.

(b) *Doe v. Collins*, 2 T. R. 498.

(c) *Lane v. Earl Stanhope*, 6 T. R. 345.

(d) *Day v. Trig*, 1 P. W. 286.

2. If it is the intention, an estate in *fee* will pass under the words:—

“Interest;”(e)

“All that I shall die possessed of, real and personal, of what nature and kind soever;”(f)

“All the property of whatever description or sort that I may die possessed of;”(g)

[*46] “My share of the Bastile, and other estates, situate at Coventry;”(h)

“To be kept in the family and name of the W.’s as long as can be;”(i)

“All my mortgages;”(j)

“Reversion;”(k)

“All my real property;”(l)

“Inheritance;”(m)

“To A., and if he shall happen to die in his minority,” [remainder over;](n)

“I give to A. and B. the four houses built by me; but if either of them should die before twenty-one, the survivor shall be heir to the other two houses.”(o)

If it is the intention, an estate in *tail general* will pass by a limitation:

“To A. and the heir of his body;”(p)

“To A. and his children;”(q)

“To A. and his issue;”(r)

And an estate in *tail-male* will pass by a limitation:

“To A. and his heirs male;”(s)

“To A. and his men-children;”(t)

“To A. and his issue male.”(u)

It is a distinction, on a devise simply “to A. and his children;” or “to A. and his issue;” if, at the time of the devise, A. has no children, [*47] he will take an estate-tail;(v) *but if at the time of the devise A. has children, the children will take, as purchasers, a life estate jointly with their parent.(w)

It having been the intention; under the words “leasehold ground-rents,” the leasehold *estate* in the land was held to pass, and not merely the rents reserved on under-leases.(x)

It being the intention; a reversion, *of which the testator was seised*, has been held(y) to pass under the words:—

(e) *Andrew v. Southouse*, 5 T. R. 292.

(f) *Pitman v. Stevens*, 15 East, 505.

(g) *Noel v. Hoy*, 5 Madd. 38.

(h) *Paris v. Miller*, 5 M. & S. 408.

(i) *Doe v. Wood*, 1 Barn. & A. 518.

(j) *Cripps v. Grylls*, Cro. Car. 37. See *ibid.* 450.

(k) *Bailis v. Gale*, 2 Ves. 48.

(l) *Nichols v. Butcher*, 18 Ves. 193.

(m) *Widlake v. Harding*, Hob. 2.

(n) *Frogmorton v. Holyday*, 3 Burr. 1618. See *ibid.* 1623; 9 East, 403; also *Tomkins v. Tomkins*, cited 9 East, 404.

(o) *Doe v. Cundall*, 9 East, 400.

(p) Cro. Eliz. 314.

(q) 6 Co. 17.

(r) *Ibid.*

(s) *Lord Ossulton's case*, 3 Salk. 338. 11 Mod. 189.

(t) 6 Co. 17 b.

(u) Cro. Eliz. 40.

(v) 6 Co. 17. 17 b. *Davis v. Stevens*, Doug. 306.

(w) 6 Co. 17. 17 b. Doug. 310.

(x) *Kaye v. Laxon*, 1 Bro. C. C. 76.

(y) See also *Doe v. Wetherby*, 11 East,

"I will that Fortune, my wife, shall have to her use and occupation all that my living which I now do occupy, so long as she do keep my name, until such time as my son, John Scatergood, shall come to the age of twenty-one years; and that then she have the thirds *of all my living*;"(y)

"I devise all my free and copyhold land to my executors, for the performance of my will, and the will of my father [in which were several legacies;] to have and to hold to them, and every of them; they to take the profits of it for ten years to the use of my will; and I will that afterwards my executors, or one of them, shall sell the land, and distribute the money in performance of the said will;"(z)

"I devise Spain's Hall to Thomas Kemp; to have to hold the said lands, from and after a year after my decease, and after the decease of my daughter" [on whom part of the "estate had been settled for life] remainder over in tail;(a) [*48]

"I devise, &c., all other my lands, tenements, and hereditaments out of settlement;"(b)

"I devise, &c., all my lands, tenements, and hereditaments in the three towns of Littleton, Marston, and Milbrooke, or elsewhere, not by me formerly settled;"(c)

"To my son Daniel, I give 4*l.* per annum of my ground-rent, his heirs and assigns for ever;"(d)

"I devise, &c., all that my part, purport, and portion of and in the tenements called and known by the name of Henson, within the parish of St. Minver;"(e)

"I give and devise all that my messuage or tenement, with the barn, stable, and other buildings thereto belonging: which said messuage or tenement, buildings, lands, and premises, are now in my own possession: and all other my real estate whatsoever, in Murrey, or elsewhere, in the parish of Yoxall, in the county of Stafford, or in any other place whatsoever, in Great Britain, to my wife, S. B., and her assigns, for and during the term of her natural life."(f)

A reversion, *created in the will*, has been held to pass, under the words:—

"I devise the manor of A., in Somersetshire, to B., for six years. And the rest of all my lands in Somersetshire, or elsewhere, I give to my brother, and the heirs of his body;"(g)

"I devise to Edward Harris, and Mary, his wife, a messuage in the parish of St. Martin in the Fields, *for their* [*49] lives; and the better to enable my wife to pay my legacies, I devise all my messuages, lands, tenements, and hereditaments whatsoever, within the kingdom of England (not above disposed of,) to have and to hold to her and her assigns for ever;"(h)

"I devise all my lands, tenements, and hereditaments, to A. *Item*,

322. William v. Thomas, 12 East, 141.
Ridout v. Pain, 2 Atk. 486. 1 Ves. 10.

(y) Howland v. Doughty, Cro. Jac. 649.

(z) Hawes v. Coney, Cro. Eliz. 159.
Townshend v. Wale, ibid. 524.

(a) Cook v. Gerrard, 2 Keb. 206, 224.
1 Lev. 212.

(b) Strode v. Lady Russell, 2 Vern. 621.

(c) Chester v. Chester, 3 P. W. 56.

(d) Maundy v. Maundy, 2 Stra. 1020.

(e) Doe v. Phillips, 1 T. R. 105.

(f) Doe v. Meakin, 1 East, 456, 457.

(g) Wheeler v. Walroone, Aleyn. 28.

(h) Willows v. Lydcot, 2 Vent. 285.

I devise all my goods and chattels, money and debts, and whatever else I have not before disposed of, to the said A."(i)

"I devise, &c., to A. for life, [remainders over, remainder to the testator's own right heir;] and all the rest, residue, and remainder of my goods, chattels, and personal estate, together with my real estate, not hereinbefore devised, I give to the said A."(j)

3. Subject to intention,

Any words which describe the devisee are sufficient.

A question may arise if a person *is* well described; but if the words of the will name a person, and there is evidence to prove a particular person to be the object meant, the devise will be valid, in whatever words the devisee may be described.

"In the case of a devise," Lord Hardwicke has said, "any thing that amounts to a *designatio personæ* is sufficient; and although [adverting to the particular case before him] in strictness they are not his sons; yet if they have acquired that name by reputation, in common parlance they are to be considered as such. It has been said, the testator has likewise made a mistake in their names, and therefore they cannot take; but the [*50] law is otherwise; for if a man is mistaken in a devise, yet if a person is *clearly made out by averment to be the person meant, and there can be no other to whom it may be applied, the devise to him is good."(k)

"The rule," it has been said by Lord Eldon, "cannot be stated too broadly, that the description, 'child, son, issue,' every word of that species, must be taken *primâ facie* to mean *legitimate* child, son, or issue."(l) It is only, however, *primâ facie*; for either of the words, if it is the intention, may mean *illegitimate* offspring.

There are distinctions between devises to illegitimate children, born *in ventre sa mere*, and not *in esse*.

If a person devises to a *born* illegitimate child of A., the father or mother, the devise is legal; but to enable the child to take, it must *at the time of the devise* be known, by reputation, as the child of A. Parol evidence is admissible to prove the fact; and, if proved, and the child appears in the will to be the object of the devise, it will be entitled to take under it.(m)

There appears to be the distinction, that parol evidence is admissible to prove an illegitimate child has gained a name by reputation, but it is not admissible to prove an illegitimate child is intended in a devise: *This* must appear in the will itself. Not to confine a devise to legitimate children, there must be evidence in the will itself to extend it to children which are not legitimate.(n)

If a person devises to an illegitimate child of A., the *father*, the child [*51] being in *ventre sa mere* when the will is *made, it appears the devise is not legal, and therefore the child will not be able to take under it.(o)

(i) Hopewell v. Ackland, 1 Salk. 239.

(j) Bidout v. Pain, 3 Atk. 486. 1 Ves. 10.

(k) Rivers' case, 1 Atk. 410.

(l) 1 Ves. & B. 462.

(m) Wilkinson v. Adam, 1 Ves. & B. 422. Metham v. Duke of Devon, cited, *ibid*.

458. Beachcroft v. Beachcroft, 1 Madd. Rep. 430.

(n) Cartwright v. Vawdry, 5 Ves. 530. Godfrey v. Davis, 6 Ves. 43. 1 Ves. & B. 463, 470. Swaine v. Kennerley, *ibid*. 469.

(o) Earle v. Wilson, 17 Ves. 528. See 1 Mer. 151, 153.

But if a person devises to an illegitimate child of A., the *mother*, the child being in *ventre sa mere* when the will is made, the devise is legal; and, if the description of the child in the will proves it to be the object of the devise, it will be entitled to the estate devised to it. (p)

If a person devises to an illegitimate child of A., the father, or mother, the child not being *in esse*, neither born, nor in *ventre sa mere*, when the will is made, it should seem the devise is illegal; and, therefore, notwithstanding A. has afterwards an illegitimate child, the devise is void. (q)

As, provided the intention is made out, *any* words which describe the devisee are sufficient, it has been determined that grand-children, if there are no children, may take under a devise to children; (r) a second born son, the eldest at the death of the testator, may take under a limitation to "the first son;" (s) a first born, and only son, born within a year after the death of the testator, may be entitled under a devise to "the youngest child born within twelve months after the testator's death;" (t) an eldest son may take under the name of "heir," in the life-time of [*52] "his father;" (u) an eldest daughter may take under the name of "heir," in exclusion of her sisters; (v) a child in *ventre sa mere* may be entitled under a devise to children, "living at A.'s death;" (w) on a devise "to the heirs male" of a person, the heir male, although he is not the heir general, of that person, may take under the devise. (x) The intention of the testator is permitted, in the last instance, to raise an exception to the general rule, that, to take by *purchase*, the heir must be heir *general*, as well as heir male. "There is a distinction," Lord Hardwicke has observed, "between taking by descent and by purchase; in case of the former, it is sufficient to be nearest in descent, claiming all along through males, notwithstanding an heir female be heir general, and this by the statute *de donis*; but to take by purchase, he must be heir general as well as heir male; agreeable to this is Co. Litt. 24 b, which is transcribed from his own argument in Shelley's case.—I am of opinion there may be an exception to the rule before laid down, appearing clearly by the intention of the testator." (y)

(p) Gordon v. Gordon, 1 Mer. 141.

(q) Metham v. Duke of Devonshire, 1 P. W. 529. See 1 Ves. & B. 452, 468. 1 Mer. 145.

(r) Crooke v. Brookeing, 2 Vern. 106. See 1 Ves. 201. Gale v. Bennett, Amb. 681. Wythe v. Thurlston, *ibid.* 555. Wyth v. Blackman, 1 Ves. 196.

(s) Lomax v. Holmden, 1 Ves. 290.

(t) Emery v. England, 3 Ves. 232. See Duke v. Doidge, 2 Belt Ves. sen. 203, note (a). Lady Lincoln v. Pelham, 10 Ves. 166. Bowles v. Bowles, *ibid.* 177.

(u) James v. Richardson, 1 Ventr. 334.

Burchett v. Durdant, 2 Ventr. 311. S. C. W. 529. See 1 P. W. 329.

(v) Tilly v. Collier, 2 Lev. 162.

(w) Beale v. Beale, 1 P. W. 244. *Ibid.* 342. Clarke v. Blake, 2 Bro. C. C. 390. 2 H. Bl. 399. 2 Ves. jun. 673. Trower v. Butts, 1 Sim. & St. 181.

(x) Newcoman v. Bethlem Hospital, Amb. 8. Wills v. Palmer, 5 Burr. 2615.

(y) Amb. 10, 11. See Harg. Co. Litt. 24 b. (3), 164 a. (2).

[*53]

*CHAPTER VII.

OF THE USE OF TECHNICAL WORDS IN AN UNTECHNICAL SENSE.

TECHNICAL words are not required in a will; nor, if they are used, will they bear their technical signification, if the testator explains his own meaning of them.(a)

"Heirs,"(b) and "heirs of the body,"(c) are, technically, words of *descent*; yet, if it is the intention, "*heirs*,"(d) or "*heirs of the body*,"(e) will be accepted as words of *purchase*.

"Issue,"(f) "*children*,"(g) "*son*,"(h) are, technically, words of *purchase*; yet, either "*issue*,"(i) "*children*,"(k) or "*son*,"(l) will, if it is the intention, be accepted as a word of *descent*.

The technical meaning of "*estate*," is ownership of land;(m) yet, if it is the intention, it will be accepted to signify the land itself (the popular meaning of the word,) and not the interest in it.(n)

[*54] *The word "*estate*," in its most extensive technical meaning, signifies both *real* and *personal*(o) property; yet, if it is the intention, it will be accepted to mean *personal* property alone.(p)

Both the technical and proper meaning of "*effects*," is *personal* property;(q) yet it may mean *real* property, if the testator uses the word in that sense.(r)

[*55]

*CHAPTER VIII.

OF DEFECTIVE EXPRESSIONS IN A WILL.

IT is sufficient if the words in a will make known the testator's intention. A defective expression the law will rectify. If words are omitted, they will be understood to be implied.(a) Any word, incorrectly used

(a) See 2 Ves. & B. 370. 5 Madd. Rep. 39.

(b) 2 Ld. Ray. 1440.

(c) 11 East, 671.

(d) Archer's case, 1 Co. 67. Watkins' Desc. 170.

(e) Lowe v. Davies, 2 Ld. Raym. 1561. Doe v. Laming, 3 Burr. 1100. Harris v. Barnes, 4 Burr. 2157. Amb. 666. Goodtitle v. Herring, 1 East, 264. Bagshaw v. Spencer, 2 Atk. 577. 1 Ves. 142. Doe v. Goff, 11 East, 668.

(f) 2 Ld. Raym. 1440. 2 Atk. 582. 4 T. R. 299. 6 Co. 17 b. 2 Vern. 546.

(g) 6 Co. 16 b. 17, 17 b. 2 Atk. 222. 2 Vern. 545. 5 T. R. 323. Goodtitle v. Woodhull, Willes, 592.

(h) 5 T. R. 323, 324. See 2 Barn. & C. 533.

(i) 2 Atk. 582. 4 T. R. 299.

(k) Davie v. Stevens, Doug. 306. See Hodges v. Middleton, ibid. 415.

(l) Chapman v. Brown, 3 Burr. 1626. 5 T. R. 323. Mellish v. Mellish, 2 Barn. & C. 520.

(m) 6 Mod. 107.

(n) Goodwyn v. Goodwyn, 1 Ves. 226. Cowp. 306. 2 T. R. 659. Petteward v. Prescott, 7 Ves. 541. Knotsford v. Gardiner, 2 Atk. 450.

(o) 6 Mod. 107.

(p) Doe v. Hurrell, 5 Barn. & A. 18.

(q) Doe v. Dring, 2 M. & S. 448.

(r) Hogan v. Jackson, Cowp. 299. Doe v. White, 1 East, 33.

(a) Spalding v. Spalding, Cro. Car. 185. Strong v. Cummin, 2 Burr. 767. Fonnereau v. Fonnereau, 3 Atk. 315. Doe v. Hicks, 7 T. R. 433. Doe v. Micklem, 6 East, 485.

for another, will be taken in the sense the testator meant it.(b) In particular, the word "*or*," is constantly construed "*and*."(c) Also "*and*" may be construed "*or*."(d) And, generally, any words, which the remainder of the will proves to be incorrect to express the testator's meaning, will be accepted in the sense intended.(e)

*CHAPTER IX.

[*56]

WORDS OF INTENTION ARE WORDS OF DEVISE.

SECTION I.

IMPLICATION OF ESTATES.

Words of intention in a will are words of devise. A testator is not required to expand his intention in formal limitations of devise; it is enough if the words of intention imply them. Words of limitation,(a) and estates for life,(b) and in tail,(c) have been implied in the authorities cited in the margin.

It appears to be a distinction, if a person, seised in fee, devises to his *heir at law*, after the death of A.; A. will, by implication, take an estate for life; but if the devise is to a *stranger*, A. will not, by implication in this case, take any estate; but, until A.'s death, the land will descend to the heir at law.(d)

Farther, the law will not understand a devise to be implied in the words of a will, if the devise, in the particular case, would be an unreasonable one;(e) or there are other words in the will to negative the implication contended for.(f)

(b) Bullock v. Stones, 2 Ves. 521.

(c) Soulle v. Gerrard, Cro. Eliz. 525. Walsh v. Peterson, 3 Atk. 193. Framlingham v. Brand, 3 Atk. 390. Wright v. Wright, 1 Ves. 409. Brownword v. Edwards, 2 Ves. 243. (See Doe v. Jessop, 12 East, 288.) Denn v. Kemeys, 9 East, 366. Eastman v. Baker, 1 Taunt. 174. Right v. Day, 16 East, 67.

(d) Jackson v. Jackson, 1 Ves. 215.

(e) Luxford v. Cheeka, 3 Lev. 125. Newland v. Shephard, 2 P. W. 194. White v. Barber, 5 Burr. 2703. Amb. 701. Rudsell v. Rudsell, 5 Burr. 2806. See also Doe v. Stenlake, 12 East, 515. Hewet v. Ireland, 1 P. W. 426.

(a) Evans v. Astley, 3 Burr. 1570. Fen v. Lowndes, 4 Burr. 2246.

(b) Higham v. Baker, Cro. Eliz. 15. Cro. Jac. 75. Blissett v. Cranwell, 3 Lev. 373. Roe v. Summerset, 5 Burr. 2608. Doe v. Bowling, 5 Barn. & A. 722. See also Aspinall v. Petvin, 1 Sim. & St. 544.

(c) Stanley v. Lennard, 1 Eden, 87. Amb. 355. Doe v. Halley, 8 T. R. 5.

(d) Cro. Jac. 75. Doe v. Bowling, 5 Barn. & A. 722. 4 Bro. C. C. 534, 535. 1 Sim. and Stu. 550.

(e) Horton v. Horton, Cro. Jac. 74.

(f) Boon v. Cornforth, 2 Ves. 277.

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*SECTION II.

IMPLICATION OF CROSS-REMAINDERS.

If A., seised in fee, devises to B., C., and D., for their lives, in sole, (g) tenancy or in common, with cross-remainders between them; on the death of B., his land will remain to C. and D., as tenants in common; and, at the death of C., the whole will remain to D. for his life. So, if the devise is to them in tail, with cross-remainders between them; on the death of B., and failure of the heirs of his body, B.'s land will remain to C. and D., as tenants in common in tail; and on the death of C., and failure of his issue, the whole will remain to D. in tail. In these instances, the next remainder-man, or reversioner (as the case may be,) is not entitled to the land until all the particular estates to B., C., and D., and the remainders to them, are determined. (h)

It is legal to devise to any number of persons with cross-remainders between them. If they are not *expressly* limited, words in the will may be understood to *imply* (i) them. They are often implied in a limitation over; but, it should seem, the law will accept *any* (j) words of intention to imply them.

Cross-remainders, like every other part of a will, depend on the intention. If it is *not* the intention to give the land of each of the several devisees, on the determination of his estate, away from his co-devisees, but to the survivors; then cross-remainders *are* limited. But if it is the intention to give the land of each of the several devisees, on the determination of his estate, away from his co-devisees, to *a remainder-man, or the reversioner, then cross-remainders are *not* limited.

Cross-remainders have been held to be implied in the devises which follow: (k)

"I will that the third part of all my lands shall descend and come to my son and heir; and the other two parts I give and bequeath to my four younger sons, A., B., C., and D., and to the heirs male of their bodies begotten; and if the infant *in ventre ma feme* shall be a son, then he to have his fifth part as co-heir with his four youngest brothers; and if they all five shall happen to die without issue male of their bodies, or any of their bodies, lawfully begotten, then I will that the said two parts shall revert, remain, and come to my next heirs for ever." (l)

"I devise, &c. to the use of all and every the daughter and daughters of Peter Holford, and Constantia Maria Holford, lawfully to be begotten, and to the heirs of their body and bodies; such daughters, if more than one, to take as tenants in common, and not as joint tenants: and, for default of such issue, to the use of my right heir." (m)

"I give, devise, and bequeath all those my lands, tenements, and hereditaments, situate and being at Merton Abbey, in the county of Surry, unto my loving brothers William Phipard and John Phipard, and sister

(g) Chadock v. Cowley, Cro. Jac. 695.

(h) 4 T. R. 713. 1 Taunt. 239. 3 Barn. & A. 428.

(i) Doe v. Burville, 2 East, 47, note (d). 1 Taunt. 237, 239.

(j) 3 Barn. & A. 428, 429.

(k) See also Doe v. Burville, 2 East, 47, note (d); and Mogg v. Mogg, 1 Mer. 654.

(l) Anonymous, 3 Dyer, 303 b.

(m) Wright v. Holford, Cowp. 31.

Elizabeth Cleaves, and the heirs of their bodies lawfully begotten and to be begotten, as tenants in common, and not as joint tenants; and, for want of such issue to my own right heirs for ever."⁽ⁿ⁾

"I devise, &c., to the use of all and every the child and children of my late brother John Hey, deceased, which shall be living at the time of my decease; To have and to *hold the same, if more than [*59] one child, to them and their heirs, share and share alike, as tenants in common, and not as joint tenants. And in case all and every of the said children of my said brother shall happen to die in my life-time, or after my death, without issue, then I hereby give and devise all and singular my said real estate to my right heirs."^(o)

"I devise, &c., to all and every the daughter and daughters of the body of my daughter Martha, and the heirs male of the body of such daughter or daughters, equally between them, if more than one, as tenants in common, and not as joint tenants; and for and in default of such issue, I give and devise all my said premises unto my right heirs for ever."^(p)

"I give and devise all and every the said premises to all and every the younger children of the said Mary Foxon, begotten or to be begotten, if more than one, equally to be divided amongst them, and to the heirs of their respective body and bodies; to hold as tenants in common, and not as joint tenants: and if the said Mary Foxon shall have only one child, then to such only child, and to the heirs of his or her body lawfully issuing; and, for want of such issue, I give and devise the said premises to, &c."^(q)

"And in default of such issue, I give the said moiety of the same manors and premises to my three daughters, and to the heirs of their bodies respectively, as tenants in common; and, in default of such issue, I give the same to my own right heirs for ever."^(r)

Cross-remainders have been adjudged not to be implied in the following instances:—

"I devise, &c., to my grandson Richard Holden, and to Elizabeth Holden my grand-daughter, equally to be *divided, and to the heirs of their respective bodies; and, for default of such issue, to my grand-daughter Ann Holden and her heirs."^(s) [*60]

"I devise, &c., to my wife Margaret Owen, for her life, and, after her decease, to my son and daughter, John and Margaret Owen, to be equally divided between them, and the several and respective issues of their bodies, and for want of such issue, to Margaret Owen, my wife, in fee."^(t)

"I leave the Withy Stakes' farm to my two sons John Cooper and George Cooper, equally between them, share and share alike, and all my household goods and my whole stock of cattle, and husbandry-ware of all kinds whatsoever, with all my bonds, bills, and book debts, and cash, and personal property, paying all my debts, funeral expenses, and legacies hereinafter named; and I entail the Withy Stakes' farm on the male heirs of John Cooper and George Cooper, being born in wedlock."^(u)

There appears formerly to have been a distinction between the impli-

(n) *Phipard v. Mansfield*, Cowp. 797.

(o) *Bradford v. Foley*, Doug. 63.

(p) *Atherton v. Pye*, 4 T. R. 710.

(q) *Watson v. Foxon*, 2 East, 36.

(r) *Doe v. Webb*, 1 Taunt. 234.

(s) *Comber v. Hill*, Stra. 969.

(t) *Davenport v. Oldis*, 1 Atk. 579; see Cowp. 799. 2 East, 41. 1 Taunt. 238, 239. 3 Barn. & A. 427.

(u) *Cooper v. Jones*, 3 Barn. & A. 425.

cation of cross-remainders between two persons only, and between more than two. The implication might be between two persons only, but not between more than two.(v) But this doctrine is exploded. "It has been truly said," observed Sir James Mansfield, in *Doe v. Webb*, "that the ancient doctrine on this subject has been broken in upon; but it is wonderful how it ever became established."(w) And to the same effect, Mr. Justice Chambre: "I wonder, as my lord does, how the old doctrine [*61] ever became established. The oldest case is *that in *Dyer*, 303 b, and there no difficulty was found in giving cross-remainders by implication among five."(x)

A distinction, however, seems, at this day, to be acknowledged between the *presumption* of cross-remainders between two persons only, and between more than two.(y) Lord Kenyon has subscribed to this doctrine, in the words of Lord Mansfield: "Where cross-remainders are to be raised by implication between two and no more, the presumption is in favour of cross-remainders; where they are to be raised between more than two, the presumption is against them: but that presumption may be answered by circumstances of plain and manifest intention either way."(z) Notwithstanding such high authority, it may, perhaps be permitted to doubt the soundness of the distinction adopted. A different presumption on the same words (the distinction it is apprehended amounts to this) appears to approach too near to *conjecture*, to be admissible in the exposition of a will.

[*62]

*CHAPTER X.

THE SAME WORD MAY BE ACCEPTED IN DIFFERENT SENSES.

If a testator includes different kinds of property in a devise, the same words of it may be accepted to have different meanings, and, referred to each kind of property, to have the particular meaning applicable to it. This latitude of interpretation was permitted in *Forth v. Chapman*.(a) In this case, there was a devise of freehold and leasehold estates to William Gore, "and if either he or Walter Gore should depart this life, and leave no issue of their respective bodies," the testator devised the premises over. Lord Chancellor Parker, in giving judgment, observed, "what seemed very material, that by this will, the devise carried a freehold as well as a leasehold estate to William Gore, and if he or Walter died leaving no issue, then to the children of his brother and sister; in which case it was more difficult to conceive how the same words, in the same will, at the same time, should be taken in two different senses. As to the freehold, the construction should be, if William or Walter died without issue *generally*, by which there might be, *at any time*, a failure of issue; and, with respect to the leasehold, that the same words should be intended to signify their dying without leaving issue *at their death*. How-

(v) *Gilbert v. Witty*, Cro. Jac. 655; see
1 Taunt. 236.

(w) 1 Taunt. 237.

(x) 1 Taunt. 239.

(y) 4 T. R. 713. 2 East, 40. 3 Barn. &
A. 429.

(z) 2 East, 40.

(a) 1 P. W. 663.

ever, it might be reasonable enough to take the same words, as to the different estates, in different senses, and as if repeated in several clauses, viz., 'I devise to A. my freehold land; and, if A. die without leaving issue, then to B.: and I devise my leasehold to A., and, if [*63] *A. die without leaving issue, then to B.: ' in which case, the different clauses would have the different constructions mentioned to make both the devises good; and it was reasonable it should be so, *ut res magis valent quam pereat.*'(b)

A like distributive construction has, on the authority of *Forth v. Chapman*, been admitted in the cases in the margin.(c)

*CHAPTER XI.

[*64]

THE INTENTION IS TO BE COLLECTED FROM THE WHOLE WILL.

SECTION I.

THE end proposed in interpreting a will is, to fulfil the testator's intention. It is, therefore, quite immaterial in what part of the will the intention is found. The words are the means to ascertain it; and however they may be scattered, if they explain the intention, they are to be collected and put together, that the particular devise may have the effect intended. Few testators, perhaps, range their ideas compactly enough to express their meaning at once, without explaining their own words. It would, for this reason, evidently in many cases prejudice the intention, if the law collected the sense of one limitation, or one part only, of the will, and looked no farther; and, therefore, with reason, all the words in the will, wherever they are, are subservient to make out the intention of any part of it.(a)

Of Introductory Words.

A testator frequently begins his will with enumerating his property, and declaring his intention to dispose of it. In these cases, the introductory words will not, of themselves, form a devise, but are accepted as explanatory of the will which follows them. "Introductory words," Lord Mansfield has said, "cannot vary the construction *of [*65] a devise, so as to enlarge the estate of a devisee, unless there are words in the devise itself sufficient to carry the degree of interest contended for. But wherever they assist to shew the intention of the testator, the Courts have laid hold of them, as they do of *every other* circumstance in a will, which may help to guide their judgment to the right and true construction of it."(b) "Though the introduction of a will,

(b) 1 P. W. 667.

(c) *Harris v. Bishop of Lincoln*, 2 P. W. 140. *Hope v. Taylor*, 1 Burr. 268. *Southby v. Stonehouse*, 2 Ves. 611. *Daintry v. Daintry*, 6 T. R. 307. *Crooke v. De Vandes*, 9 Ves. 197. *Elton v. Eason*, 19

Ves. 73. *Kinch v. Ward*, 2 Sim. & Stu. 409.

(a) *Willes*, 3. 3 Burr. 1622, 1625. *Forrest*, 160. *Doe v. Allcock*, 1 B. & A. 137.

(b) *Cowp.* 306.

declaring that a man means to make a disposition of all his wordly estate, is a strong circumstance, connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee, where he has used no words of limitation, it will not do *alone*. And all the cases cited in the argument [Forrester, 157. Ibbetson v. Beckwith; 1 Wils. 139; 3 Wils. 143; Hogan v. Jackson, Cowp. 299,] to shew that the introductory words in this case would *alone* be sufficient, fall short of the mark; because they contained other words clearly manifesting the intention of the testator to pass a fee."(c)

A testator began his will in the words:

"As to my wordly substance;"(d)

"As touching my wordly estate wherewith it hath pleased God to bless me;"(e)

"As touching such wordly estate wherewith it hath pleased God to bless me;"(f)

"As touching the disposition of all such wordly estate as it hath pleased God to bestow on me;"(g)

"As to all such wordly estate as God has endued me with;"(h)

[*66] "For those wordly goods and estates wherewith it has pleased Almighty God to bless me;"(i)

"As for my wordly affairs and estate;"(j)

"As touching all such temporal estate of lands, goods, and chattels, as God hath endowed me with;"(k)

"As to my estate and effects, both real and and personal, I give and dispose thereof in manner following;"(l)

"As touching such wordly and personal estate wherewith it has pleased God to bless me;"(m)

"As to the wordly estate with which it has pleased God to bless me;"(n)

"I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts are paid;"(o)

In all these cases it was admitted, that the introductory words in a will may be accepted as explanatory of the will which follows; *juncta juvant*;(p) but that of themselves they are not evidence sufficient of an intention to convey to a devisee the whole estate of the testator.

(c) Ibid. 356.

(d) Hogan v. Jackson, Cowp. 299.

(e) Ibbetson v. Beckwith, Forrest. 157.

(f) Loveacres v. Blight, Cowp. 352. Roe v. Bolton, cited Doug. 732. Goodright v. Barron, 11 East, 220.

(g) Wright v. Russell, cited Cowp. 661.

(h) Denn v. Gaskin, Cowp. 657.

(i) Right v. Sidebotham, Doug. 730.

(j) Frogmorton v. Holyday, 3 Burr. 1618; see 1625.

(k) Goodright v. Stocker, 5 T. R. 13.

(l) Doe v. Buckner, 6 T. R. 610. Doe v. Allen, 8 T. R. 497.

(m) Doe v. Wright, 8 T. R. 64.

(n) Roe v. Vernon, 5 East, 51.

(o) Pitman v. Stevens, 15 East, 506.

(p) 11 East, 223.

SECTION II.

OF CONTEXT.

THE *context* of a devise is a farther means to explain the intention. Often, by the context,

A limitation for *life* is explained to be a devise in *tail*, or in *fee*;

*A limitation in *fee*, to be a devise in *tail*;

A limitation in *fee*, to be determinable in favour of an [*67] executory devise;

A limitation in *joint-tenancy*, to be a devise in *common*.

1. A limitation for life explained to be in tail.

A limitation for *life* has been explained, and judicially determined, to be a devise in *tail*, in devises in the words:

"I will the house, that J. V. dwelleth in, to my three brothers, among them; provided always, that the house be not sold, but go unto the next of the name and blood that are males, if it may be."(q)

"I devise, &c., to Margaret, my wife, for life; and after her decease [remainder to testator's sons William and Samuel, in tail male.] If no issue male of Samuel, then my son Thomas to have the house; if Thomas marry, having a male issue of his body, lawfully begotten, then his son to have the house after his decease; if he [Thomas] have no issue male," [remainders over.](r)

"Item, I give to my wife Joan all my houses and free lands for her life; and after her death to my three daughters, equally to be divided, namely, to Joan, Avice, and Alice; and if any of them die before the other, then the others to be her heirs, equally to be divided; and if they all die without issue," [remainder over.](s)

"I devise, &c., to A. my eldest son; and if A. dies without heirs male, then to B. my other son."(t)

"I devise, &c., to A. for life, and, if he dies without issue," [remainder over.](u)

*"I devise, &c., to A., and, if he dies not having a son, [*68] then to remain to my heirs."(v)

"I devise to my wife Elizabeth all my lands, not settled in jointure; and if it shall happen that my said wife Elizabeth shall have no son nor daughter by me begotten of the body of the said Elizabeth, and for want of such issue, then the said premises to return to my brother John Wyld, if he shall be then living, and his heirs for ever."(w)

"I devise to John Wedgeborough, my house in the brook, with the outbuildings; to Charles Taylor, Robert Taylor, and William Taylor, twenty-nine acres of arable and meadow land, bought of B.; to William Taylor my house on the green, with the ground and outhouses thereto belonging; and if either of the persons before named die without issue

(q) Chapman's case, Dyer, 333, b.

(r) Sunday's case, 9 Co. 123.

(s) King v. Rumball, Cro. Jac. 448.

(t) Blaxton v. Stone, 3 Mod. 123.

(u) Robinson's case, cited 1 Vent. 230.

But see 1 P. W. 57, 605. Ives v. Legge, 3 T. R. 488, note(a).

(v) Bifield's case, cited 1 Vent. 231.

(w) Wyld v. Lewis, 1 Atk. 432.

lawfully begotten, then the said legacy shall be divided equally between them that are left alive."(x)

"I give and bequeath all my copyhold lands lying in Hazlewood to my nephew Isaac Slater; but if the aforesaid Isaac Slater should die without male heir, then my will is, that my nephew John Slater shall enter upon and enjoy the said copyhold lands, his heirs or assigns for ever."(y)

"I bequeath to Francis, my son, my houses in London, after the death of my wife; and if my three daughters, or either of them, do over live their mother, and Francis their brother, and his heirs, then they to enjoy the same houses for term of their lives."(z)

"I leave and bequeath to my dear husband all the profits and revenues of my estates at Buttermee, in Wiltshire; as also all the profits and revenues of my estate at C——, in Oxfordshire, both for his natural life;

[*69] and after the death of my dear husband, I give and bequeath my said *estates to my dear children, if I should leave any to survive me; but in case I should leave no such child or children, nor the issue of such child or children, then I give and bequeath the said estates to J. Hutton, making him hereby sole heir of this my last will and testament, in default of issue left by me."(a)

"I leave the Withy Stakes' farm, to my two sons, John Cooper and George Cooper, equally between them, share and share alike; and all my household goods, and my whole stock of cattle, and husbandry-ware of all kinds whatsoever, with all my bonds, bills, and book debts, and cash and personal property, paying all my debts, funeral expenses, and legacies hereinafter named; and I entail the Withy Stakes' farm on the male heirs of John Cooper and George Cooper, being born in wedlock."(b)

2. A limitation for life explained to be in fee.

As a general position, a limitation for *life* may be explained to be a devise in *fee*, by *any* words of explanation in the particular will.(c)

A devise without any words of limitation(d) (which, by implication, is a devise for life,) may be explained to be a devise in fee; 1st, by the creation of a trust which cannot be performed, unless the trustee has the fee; 2dly, by the tendency of farther clauses in the will to make the devise hurtful to the devisee, unless he takes the fee-simple.

[*70] 1st. The authorities in the margin(e) are instances, in *which, on a devise without any words of limitation, a trustee has been held to take the fee-simple.

2dly. A devise without any words of limitation may be hurtful to the devisee, unless he takes the fee-simple, if, excepting by means of the unanticipated yearly rents and profits of the land, it subjects him to pay either a *sum of money*, or *debts*, or *legacies*, or an *annuity*. This is evident, since after the devisee has advanced his money, for either of these purposes, he may die before he is able to repay himself out of the estate. The law, then, supposing, in all cases, a devise is intended to be

(x) Hope v. Taylor, 1 Burr. 268.

(y) Denn v. Slater, 5 T. R. 335.

(z) Webb v. Hearing, Cro. Jac. 415.

(a) Southby v. Stonehouse, 3 Ves. 611.

(b) Cooper v. Jones, 3 Barn. & A. 425.

(c) Greville Dewal, Cro. Jac. 599. Greene v. Armistead, S. C. Hob. 65. Anon. 9. Mod. 92. Frogmorton v. Holyday, 3 Burr. 1618.

Loveacres v. Blight, Cowp. 353. Doe v. Clayton, 8 East, 141. Toovey v. Bassett, 10 East, 460.

(d) See Cowp. 841.

(e) Shaw v. Way, 8 Mod. 253. Oates v. Cooke, 3 Burr. 1684. Gibson v. Lord Montfort, 1 Ves. 485. Amb. 93. Doe v. Woodhouse, 4 T. R. 89.

beneficial(*f*) rather than hurtful to the devisee, accepts the words, of a prejudicial tendency(*g*) in the will, to explain the limitation for life to be, by the testator's intention, a devise in fee. In the instance of the *annuity*, there is the farther evidence that the testator intends to give the fee-simple; that (admitting the annuity is intended, expressly or by implication, to be for life) supposing the devisee to have a life estate only, and to die before the annuitant, the annuity will cease in the annuitant's life-time.(*h*)

A devisee for life by implication, subjected to pay a *sum of money*, has taken a fee-simple on devises in the words:(*i*)

"I devise, &c. to my wife for life, and after her decease, to John, my eldest son, paying 40s. to each of his brothers and to his sister, within two years after the death of my wife."(*j*)

"I devise, &c. to A. for life, and after her death to B., paying 45s. to C."(*k*)

*A devisee for life by implication, subjected to pay the *debts* of the testator, has taken a fee-simple on devises in the [*71] words:

"I devise to my brother Richard all my lands, tenements, and hereditaments, and all my personal estate, and whatever else I have in the world, and make him executor, desiring him to pay my debts and legacies."(*l*)

"I give and bequeath my freehold house, with the appurtenances, &c., and all the furniture thereto belonging, to Elizabeth Gibson, whom I make executrix of this my last will, she paying all my just debts, and funeral expenses, and the legacies before mentioned, twelve months after my death. I likewise leave to the said E. Gibson all the rest and residue of my personal estate."(*m*)

"All the rest I have in the world, both houses, lands, goods and chattels, stock-in-trade, and all other things that belong or may belong to me, I give to my present wife, Joan Pascoe, my executrix, so that she shall sell my stock-in-trade and household goods; and if these will not pay the debts, she shall sell next the house of fee in Penzance [not specifically devised,] and not Prospednick; so that my executrix shall pay, in good time, all lawful debts that shall appear."(*n*)

"I give and bequeath to George Snelling and Sarah his wife all that my messuage or tenement, farm, lands, and premises, situate in Bramley aforesaid: also all that my messuage or tenement, garden, and premises, situate in Wonerash aforesaid, and now in my occupation: also all and singular my goods, chattels, rights, credits, ready money, and personal estate, of what nature and kind soever, as I shall die seised and possessed of, interested in, or entitled to, after having thereout first paid and discharged [*72] *all my just debts and funeral expenses: also subject to the payment thereout all the aforesaid legacies. And I appoint the said George

(*f*) 6 Co. 16. 2 Mod. 26. Cowp. 841. Willes, 141, 651.

(*g*) See 2 Mod. 26. Willes, 141, and note(*d*).

(*h*) 5 T. R. 14, 295.

(*i*) See also Moore v. Price, 3 Keb. 49. Spicer v. Spicer, Cro. Jac. 527. Greeve v. Dewel, ibid. 599. Hob. 65.

(*j*) Wellock v. Hammond, Cro. Eliz. 204.

(*k*) Collier's case, 6 Co. 16. Cro. Eliz.

(*l*) Ackland v. Ackland, 2 Vern. 687.

(*m*) Doe v. Holmes, 8 T. R. 1.

(*n*) Goodtitle v. Maddern, 4 East, 496.

Snelling to be sole executor of this my last will and testament, whom I charge with the payment of all my just debts, legacies and funeral expenses."(*o*)

A devisee for life by implication, subjected to pay *legacies*, has taken a fee-simple on devises in the words:(*p*)

"I devise, &c., to A.; and bequeath 5*l.* to B.; and I direct A. to pay it, but give him two years time to pay it."(*q*)

All the rest, residue, and remainder of my messuages, lands, tenements, hereditaments, goods, chattels, and personal estate whatsoever, my legacies and funeral expenses being thereout paid, I give, devise, and bequeath to my sister Jane Dewdney; and do hereby appoint her sole executrix and residuary legatee of this my will."(*r*)

A devisee for life by implication, subjected to pay an *annuity*, has taken a fee-simple on devises in the words:(*s*)

"I devise, &c., to James and Francis, my sons, and will that they shall pay annually to William Hunt, my eldest son, and his heirs, 3*l.*"(*t*)

"I devise, &c., to Roger Wittenbury and John Wittenbury, and they to pay yearly to the Bachelors' Company of Merchant Taylors, 6*l.* 10*s.*; and, if they or their successors deny the payment of the said sum, then it shall be lawful to the wardens of the said company to enter and discharge them for ever."(*u*)

[*73] "I devise, &c., to Richard, my son, paying to Thomas, 3*l.* a year."(*v*)

"I devise, &c., to my son Robert; which houses I give to my son on this condition, that he pay unto his two sisters 5*l.* a year, the first payment to begin at the first of the four most usual feasts that shall next happen after my death, so as the said feast be a month after my death."(*w*)

"I devise, &c., to the poor of Sutton 40*s.*, to be distributed by my executrix, with four coats, four hats, on every 21st of November, for ever; and all my lands, tenements, and hereditaments, and all my personal estate, to Margaret, my executrix."(*x*)

"I devise, &c., to A., conditionally, that he shall allow to my son Nicholas, meat, drink, apparel, washing and lodging during his natural life."(*y*)

"I give and bequeath my two copyhold tenements, now in the occupation of Edward Twogood and Elizabeth Savill, being in Castle-Heddingham, to Sarah Boreham, the daughter of Elizabeth Boreham, widow; she paying thereout 40*s.* a year to her sister Elizabeth Boreham."(*z*)

"I give to Mary Ramsay, the sum of 20*s.*, to be paid by two equal payments after my decease, for and during her natural life, to be paid by my executor after-named. I devise to my kinsman Thomas Allin all my two yard-lands, with my house and homestead with the appurtenances. And all the residue and remainder of my goods, chattels, debts,

(*o*) Doe v. Snelling, 5 East, 87.

(*p*) See also Freak v. Lea, 2 Lev. 249.
Ackland v. Ackland, 2 Vern. 687. Doe v. Snelling, 5 East, 87.

(*q*) Reeves v. Gower, 11 Mod. 208.

(*r*) Doe v. Richards, 3 T. R. 356.

(*s*) See also Jenkins v. Jenkins, Willes, 650. Doe v. Woodhouse, 4 T. R. 89.

(*t*) Shailard v. Baker, Cro. Eliz. 744.

(*u*) Webb v. Hearing, Cro. Jac. 415.

(*v*) Spicer v. Spicer, Cro. Jac. 527.

(*w*) Reed v. Hatton, 2 Mod. 25.

(*x*) Smith v. Tindal, 11 Mod. 102. 2 Salk. 685.

(*y*) Lee v. Stephens, 2 Show. 49.

(*z*) Baddeley v. Leppingwell, 3 Burr. 1533.

mortgages, leases and personal estate, I give to the said Thomas Allin, he paying my debts, legacies and funeral expenses.”(a)

““I devise to my grandson John Baker, my higher dwelling house, lying near the market-place, paying yearly and [*74] every year out of the said higher dwelling-house the sum of 15s. unto my grand-daughter A. Halstaff.”(b)

“I devise, &c., to my sister Lois Andrew, and her assigns, during the term of her natural life, and, from and after her decease, I give and devise the same unto E. Southouse, grand-nephew of my late husband, charged and chargeable, nevertheless, with the payment of one annuity or yearly rent-charge of 20*l. per annum* to James Tooth, and his assigns, for and during the term of his natural life, to commence from and immediately after my decease, and payable quarterly by even and equal portions.”(c)

When a devise without any words of limitation is construed to be a devise in fee, there is evidence in the will that the testator *intended* to devise the whole *fee*. But if, in any case, this intention does not appear, the devisee will not be entitled to it.

Four instances, in particular, may be here mentioned, in which a devisee may not be entitled to the fee-simple:—

1. If the devise is without any words of limitation, in trust, but the trust can be performed with a less estate than the fee, the trustee will not be entitled to the fee-simple.(d) In *Doe v. Simpson*, a person devised in the words: “I give and devise to Mr. H. Hyatt, my cousin Fitz-Ferrand, and Mr. Syddall, and the survivor of them, and the executors and administrators of such survivor, all those my messuages, lands, &c., whatsoever, in London, Kensington, and in the parish of St. Matthew, Bethnal Green, Middlesex, together with all arrears of rent due from the tenants of the said estates, and the bond and [*75] judgment I have from my tenant John Sugar, for arrears [*75] due; in trust, that they, out of the rents and profits of the said estates and arrears due, shall pay one annuity of 50*l.* to my sister Mrs. Holme, for her life, by half-yearly payments, from the time of my decease; and also to pay one other annuity of 50*l.* to my sister Mrs. Dickinson, for her life, by half-yearly payments, for her sole and separate use, &c. And from and after payment of the said annuities, then in trust, out of the said rest and residue of the said rents and profits, to pay to my brother Thomas White, and my nephew, his son, Charles White, and Peter Holme, and the survivor of them, and the executors, &c., of such survivor, the sum of 800*l.*, to be by them paid and applied to the sole use and benefit of the said children of my said brother William, in such manner and proportion, and to and for such uses, &c., as they shall think best. And from and after payment of the said annuities, and the said sum of 800*l.*, I give and devise my said estates in London and Middlesex, last mentioned, to my brother William for life, remainder to his eldest son William for life, remainder to his second son Samuel for life, remainder to his third son Charles for life, remainder to his youngest son

(a) *Goodright v. Allin*, 2 Bl. Rep. 1041.

(b) *Goodright v. Stocker*, 5 T. R. 13.

(c) *Andrew v. Southouse*, 5 T. R. 292.

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(d) *Doe v. Simpson*, 5 East, 162. *Hawker*

v. Hawker, 3 Barn. & A. 537. See *Glover*

v. Monckton, 3 Bingh. 13.

John for life, remainder to my brother Thomas White for life, and after his decease to his son, my nephew, Charles White [the lessor of the plaintiff,] and his heirs male; and for want of such issue, to my right heirs for ever." Lord Ellenborough, who delivered the judgment, explained the reasons of it, partly, as follows: "Of the several cases cited by Mr. Wood, two of them, which have the most immediate bearing on this question, viz. *Shapland v. Smith* (1 Bro. Chan. Rep. 75) and *Silvester v. Wilson* (2 T. R. 444,) appear to establish, that if an estate for life be left

[*76] to trustees and their heirs, in trust to pay the *"profits"*, or an annuity out of *them*, to another for life; and after the death of the annuitant, or person entitled to the profits, if the estate be given to or to the use of another; in such case, the trustees take only an estate for the life of the *cestui que trust*, or the annuitant, and the remainder over is executed by the statute; and the authorities referred to, viz., *Co. Litt.* 42 a; and Sir William Cordell's case, 8 Co. 96, establish the proposition, That if an estate be devised to executors generally, for payment of debts, they will take only a chattel interest; from whence it appears to be a fair inference, that, where the purposes of a trust can be answered by a less estate than a fee-simple, a greater interest than is sufficient to answer such purpose shall not pass to them; but that the uses in remainder, limited on such lesser estate so given to them, shall be executed by the statute. I have not met with any case in which the trustees have been holden to take any other interest than either a chattel, an estate for life, or in fee; but I see no reason why they may not, in order to answer the purposes of the trust, take an estate by implication for the lives of the annuitants, with a term of years in remainder, sufficient for the purpose of raising, out of the rents and profits, the sum of 800*l.*, directed to be paid out of the same. Such an estate might certainly be limited by express terms in a deed or will; and the circumstance of the bequest to the trustees, and the personal representatives of the survivor of them, of the bond and judgment given to the testator by a tenant for arrears due (and which is certainly a matter merely of a personal nature,) goes strongly in confirmation of this construction; for if the trustees were meant to take fee, then the legal estate in the land devised, and the interest in this bond and judgment, would go to different classes of representatives of the same surviving trustees; which apparent inconsistency is avoided, if [*77] the trustees *take the same description of interest (*i. e.* a chattel interest in the land,) as they respectively must do in the bond and judgment. On the whole we are of opinion, that the trustees took an estate by implication for the lives of the annuitants, with a term of years in remainder, for the purpose of raising the sum of 800*l.*; and that after those trusts were (as they appear in evidence to have been) satisfied, the several limitations for life and in tail took effect as legal limitations."^(c)

2. Although the devisee is subjected to pay a sum of money, a debt, a legacy, or an annuity; yet, it appears, if the devise to him is *expressly* for *life*,^(f) or in *tail*,^(g) he will not be entitled to the fee-simple.^(h) "As to the argument," said Mr. Justice Bayley, in *Doe v. Wrighte*,

(c) 5 East, 162.

(h) See Cowp. 841. *Brice v. Smith*.

(f) *Doe v. Wrighte*, 2 Barn. & A. 710. Willes, 1. *Denn v. Shenton*, Cowp. 410.

(g) *Doe v. Fydes*, Cowp. 838. *Denn v. Slater*, 5 T. R. 335.

"that the charges in the different codicils would of themselves give an estate in fee to G. Sharp, the will contains only an express devise of an estate for life to G. Sharp. Now I can find no case where, after such an *express* devise, it has been held that a charge of this sort will extend the estate to an estate in fee. All the cases are where the words of the devise are *general*; and there is not one of which I am aware, in which such an effect has been given to a personal charge, after an *express* devise of an estate for life."⁽ⁱ⁾ To the same effect, Lord Kenyon, in *Denn v. Slater*: "With regard to the other question, the law on this subject is very accurately stated by Lord Mansfield, in the case in *Cowper*."^(j) There an estate is given *generally*, without adding words which would create a fee or an estate-tail, and it is charged with the payment of annuities, the devisee takes a fee: but that is not the *case where an estate-tail is given to the devisee. In this [*78] case, the deviser's wife, to whom the annuity was given, had a power of entry in case of non-payment of her annuity. And the legacies given were to be paid at a remote period, before which time the devisee had the power of acquiring the fee by suffering a recovery."^(k)

3. If the devise is without any words of limitation, but the devisee, although subjected to pay a sum of money, a debt, a legacy, or an annuity, cannot be a loser by the devise, as he is to pay the money out of the yearly rents and profits, unanticipated, of the estate, he will not be entitled to the fee-simple.^(l) A person seised of a remainder in fee after the death of his father, tenant for life, devised in the words: "I devise to D., my wife, the land I have or may have in reversion after the decease of my father, yielding and paying therefore yearly, during her life-natural, to the right heirs of my said father, 40s.;" and, by the opinion of the Court, no other estate passed by this devise but for term of life of the wife.^(m) A person, bound in an obligation that 40*l.* should be paid annually to his wife during her life, devised all his lands amongst his sons. Particular land he devised to his sons, Michael and Henry, and added this clause: "Item, all the houses and lands which I have given between my sons is to this purpose, that they all shall bear part and part alike, going out of all my houses and lands, towards the payment of my wife's 40*l. per annum* during her life, which I am bound to pay." All the Court resolved, that it was but an estate for life that passed by the devise to Michael and Henry. "It is not devised," it was said, "paying such a sum, which is a sum in gross, as it is cited in *Willock v. Hammond*, but that every one shall pay out of his part towards the payment of the *40*l. per annum* to his wife; [*79] which is *quasi* an annual rent out of the profits of the land, and no sum in gross, and therefore no fee given."⁽ⁿ⁾

4. If a sum of money, a debt, or a legacy, is *first* to be paid out of the estate, and, after payment, there is a devise without any words of limitation, the devisee, who clearly can be no loser by the devise, will not be entitled to the fee-simple. In these cases, the land is made the fund for the particular payment, but it is not given to the devisee to pay

(i) 2 Barn. & A. 722.

(j) 841.

(k) 5 T. R. 237.

(l) 6 Co. 16. *Hawker v. Buckland*, 2 Vern. 106.

(m) *Ager v. Pool, Dyer*, 371 b.

(n) *Anseley v. Chapman*, Cro. Car. 157. Sir W. Jones, 211, cited *Willen*, 653.

the money with. The land is devised to him *after* the payment of it; the charge in the will taking precedence of the devise. (o)

The law has been so stated on devises in the words:

"I devise, &c., all my lands and goods, after my debts and legacies paid, to R. Toby, and Mary, my children, [the former being the testator's heir at law,] equally to be divided between them." (p)

"All my lands, tenements, and messuages whatsoever, after debts and legacies paid, and funeral expenses are discharged, I give to my brother-in-law, James Merson. (q)

"All the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever and wheresoever, and also all my goods, chattels, and personal estate, of what nature or kind soever, after payment of my just debts and funeral expenses, I give, devise, and bequeath unto my wife, Sissily Carr, and I do hereby appoint her sole executrix of this my will." (r)

It was said, on the last devise, by Lord Kenyon, "Where a devisee is directed to pay an annual rent-charge, or a solid sum, to another person, out of the estate devised, it has been properly decided that the devisee [*80] should take a fee, *because he might be a loser, unless the estate in his hands were, at all events, sufficient to enable him to bear those charges. Where a sum of money is given, it may be payable before the rents may become due; and, where an annual charge is made on the estate, it may continue beyond the life of the devisee, and therefore it is necessary, in both those cases, that the devisee should have a permanent fund. This case has been compared to that of *Doe v. Richards*; (s) but there the words were, 'my legacies and funeral expenses being *thereout* paid,' which imported that those sums were to be paid by the devisee out of the interest given to her; and if she had died immediately after the deviser, and had only taken a life estate, the fund out of which she was to bear those charges might have failed; we were, therefore, compelled to make that decision, and I am now perfectly satisfied with it. But, in this case, the words of the will are, 'after payment of my just debts and funeral expenses.' Now, supposing the deviser had, in the beginning of the will, charged his debts and funeral expenses on his real estate, and had then, after a series of limitations, devised to his wife in the words now used, it could not have been contended that such a charge on the real estate would have passed the fee to his wife; and if not, the place, in which the same words are introduced, cannot vary the question. I admit that the real estate is charged with the payment of debts and funeral expenses, if the personalty be insufficient for that purpose; but there are no words charging the estate in the hands of the wife with the payment of those debts. This, therefore, essentially differs the present case from that of *Doe v. Richards*; for there the debts were to be paid by the devisee, and where a charge on the estate in his hands, whereas here the debts are no charge on the devisee." (t)

[*81] *Farther devises of the same kind are:—

"First, my will is, that all my debts and funeral expenses

(o) See 3 M. & S. 523.

(p) *Dickins v. Marshall*, Cro. Eliz. 330.

(q) *Merson v. Blackmore*, 2 Atk. 341.

(r) *Denn v. Mellor*, 5 T. R. 558. But

see *Denn v. Moor*, 1 Bos. & P. 558; and 8 T. R. 503.

(s) 3 T. R. 356.

(t) 5 T. R. 562.

be justly paid off and discharged out of my personal estate; and, if the same shall fall short, I do hereby charge my real estate with the payment of the same. I do hereby give and devise all my messuages, lands, tenements, and hereditaments whatsoever, situate, lying, and being in the several parishes of Skeiviog, Kilkew, and Mold, unto William Allen, of Skeiviog, son of Thomas Allen, of Skeiviog aforesaid, deceased.”(u)

“I devise, &c., to my grandson, W. Langham, with all my stock, book-debts, household goods, and furniture whatsoever, thereto belonging, after payment of my debts, legacies, &c.”(v)

“I devise, &c., to my two nieces, Mary Hender Bant and Elizabeth Bant, except 20*l.*, to be paid out of Elizabeth’s part of the lands, to M. H. Bant.”—By Lord Ellenborough on this will: “The main argument has been on the provision, ‘except 20*l.* to be paid out of Elizabeth’s part of the lands,’ which, it has been contended, is a charge to be paid out of the lands, and therefore a fee shall pass; and I agree, if it be a charge to be paid out of the lands in the hands of the devisee, the argument is good. But it appears, I think, from *Denn v. Moor*,(w) as well as from the principle on which *Doe v. Richards* was decided, that in this case a fee does not pass, because this is not a charge upon the estate in the hands of the devisee. The devise is of the lands to her two nieces, M. and E., except 20*l.* to be paid out of E.’s part of the lands to M.; as if the testatrix had said, I give the lands to my nieces equally, except in this respect, that before E. shall take any beneficial interest in her part, M. shall have out of it 20*l.*; or, in other words, E. [*82] shall have her moiety, minus 20*l.* It is, therefore, a charge antecedent to the devise, not a devise on condition of paying, as in *Collier’s* case; it is collateral to the interest of the devisee. “*Except*,” indicates that M. shall take the 20*l.* independently of any interest in E.” Mr. Justice Le Blanc considered the words “except 20*l.* to be paid out of Elizabeth’s part of the lands to M.,” as tantamount to “after payment of 20*l.* to M.”(x)

3. *A limitation in fee explained to be in tail.*

A limitation in *fee* has been explained to be a devise in *tail* in the following devise:—

“I devise, &c., to my wife for life; and, after her decease, to be equally divided between my four children, Henry, John, Elizabeth, and Sarah, and to each of them and their heirs for ever, share and share alike; and in case they shall be minded, and agree among themselves, to sell the said estate, then every one of my said children shall have their equal shares of the monies from thence arising; but if they consent and agree to keep the estate whole together, then and in such case all the rents, issues, and profits thereof, from time to time, as they shall become due and payable, shall be equally paid and divided between my four children, and to the several and respective heirs of them of their bodies lawfully begotten, share and share alike.”(y)

A limitation in *fee* is often explained to be a devise in *tail*, by a limi-

(u) *Doe v. Allen*, 8 T. R. 497.

(v) *Doe v. Ramsbotham*, 3 M. & S. 516.

(w) 1 B. & P. 558.

(x) *Roe v. Daw*, 3 M. & S. 518.

(y) *Roe v. Avis*, 4 T. R. 605.

tation over on the failure, *at any time*, of the *heirs of the body* of the devisee in fee.

By an explanation of this kind, a devisee in fee has been held to be entitled to a fee-tail only in the following devises:—

[*83] “I devise, &c., to Richard, my son, and his heirs for *ever; and if Richard dies without issue, then the land shall be equally divided amongst my three other sons.”(z)

“I devise all those my lands and tenements, lying in the parish of Cuckfield, called Heselands, to my wife for life; and, after her decease, it shall remain to John, my son, and his heirs; and, if John dies without issue, Heselands shall remain to my three daughters in fee.”(a)

“I devise all my lands to John, my son, and his heirs; and, if he die without issue, I devise my lands in Reculver, to Matthew, my nephew, in fee.”(b)

“I devise, &c., to my wife for life, and, after her death, to John, my eldest son, and to his heirs, on condition that he, as soon as the land shall come to him in possession, shall grant to Stephen my grandson, and his heirs, an annual rent of 4*l.* out of the said tenement; and if the said John dies without heirs of his body, the land shall remain to the said Stephen, and the heirs of his body.”(c)

“I devise, &c., to my three daughters, equally to be divided; and if any of them die before the other, then the others to be her heirs, equally to be divided; and if they all die without issue,” then over.(d)

“I devise, &c., to my wife for life; and, after her death, all my lands in Bradmere, to Thomas, my son, and his heirs, for ever; and my lands in East-Leak to Francis, my son, and his heirs, for ever. Item, I will that the survivor of them shall be heir to the other, if either of them die without issue.”(e)

[*84] “I give and devise all that my freehold messuage or tenement, from and after the decease of my wife Margaret, *unto Philip Brice, my son, and his heirs, for ever. Item, my will and mind is, that in case any of my children, unto whom I have bequeathed any of my real estates, shall die without issue, then I give the estate of him or them so dying unto his or their right heirs, for ever.”(f)

“I give and bequeath to my grandson, Samuel Shenton, all that my meadow ground, called Picked Mead, lying and being in the parish of Denchworth, in the county of Berks., to hold unto the said Samuel Shenton, and the heirs of his body, lawfully to be begotten, and their heirs, for ever; but in case the said Samuel Shenton shall die without leaving issue of his body, then I give and devise the said meadow-ground unto my nephew, William Geering, to hold unto the said William Geering, and his heirs, for ever.”(g)

“I devise, &c., to my daughter and only child, Mary Fifield, on her attaining 21, and to her heirs; and as to that part which has been settled on my wife, I devise the same to my said daughter, after the death of my widow. In case my widow shall die before my daughter attains 21, then I will that both parts of the estate shall go immediately to my

(z) *Soullé v. Gerrard*, Cro. Eliz. 525.

(a) *Tuttesham v. Roberts*, Cro. Jac. 22.

(b) *Browne v. Jerves*, *ibid.* 290.

(c) *Dutton v. Engram*, *ibid.* 427.

(d) *King v. Rumball*, *ibid.* 448.

(e) *Chadock v. Cowley*, *ibid.* 965.

(f) *Brice v. Smith*, *Willes*, 1.

(g) *Denn v. Shenton*, *Cowp.* 410.

daughter and her heirs, for ever; but I will that my wife shall hold and enjoy both parts until my daughter shall attain the age of 21; and in case my daughter shall die without issue, then I empower her to dispose of the whole by will, or any other instrument in writing, attested by three witnesses, as she shall direct, limit, or appoint; and for want of such issue and direction, &c., then the same shall descend, and go to my own right heirs."(*h*)

"I devise, &c., to my son, Richard Lemmon, and my daughter Elizabeth, wife of E. Baldy, and their heirs for ever; *provided [*85] that if my said son and daughter shall both have issue, then both their dividends aforesaid are to go to the issue of their own bodies; but if but one of them shall have issue, then the premises shall go to that issue, whether it be the child of my son or daughter aforesaid; but if they both die without issue of their own bodies, then immediately to the right heir at law, and his heirs for ever."(*i*)

"I give and devise, &c., to David Ormond, my eldest son and heir apparent, for life, without impeachment of waste; remainder to L. E., and his heirs, to preserve contingent remainders; remainder to the first and other sons of my said eldest son, and their heirs; and, for want of such issue, to my second son John Ormond for life," [remainders over.](*k*)

"I give and devise unto my son Joseph, his heirs and assigns for ever, all that messuage or tenement in Leeds, in his own occupation; but in case my said son Joseph shall die without issue, then I give and devise the same messuage unto the child or children with which my wife is now *ensient*, his or her heirs and assigns for ever."(*l*)

"Which last-mentioned nine closes I hereby give to the said John Agar, and his heirs for ever, upon this condition only, that he shall yearly, by half-yearly payments, at Michaelmas and Lady-day, pay to my daughter, Elizabeth Agar, the sum of 12*l.* a year, until she shall attain the age of 21 years; and, after that age, to pay her 300*l.*, in lieu thereof: and for default of payment of any part so limited and bequeathed to her, she shall enter into the said nine closes, and shall enjoy them all to her and her heirs for ever. And in case my said son and daughter both happen to die without leaving any child or issue, lawfully begotten or to be begotten, then and in such case only, I give and devise [*86] *the reversion and inheritance of all my said buildings, lands, and hereditaments whatever, to my cousin Richard Agar, and to his right heirs for ever."(*m*)

"I devise, &c., to my eldest son, Dansey Richard Dansey, and his heirs for ever; but if it shall so happen that my eldest son D. R. Dansey shall die and leave no issue, then to my son William Dansey and his heirs."(*n*)

A limitation in *fee* is often explained to be a devise in *tail*, by a limitation over to a collateral heir of the devisee in *fee*, on the failure of his heirs.

By an explanation of this kind, a devisee in *fee* has been held to be entitled to a fee-tail only in the following devises:—

(*h*) *Doe v. Rivers*, 7 T. R. 276.

(*i*) *Doe v. Whichelo*, 8 T. R. 211.

(*k*) *Lewis v. Waters*, 6 East, 336.

(*l*) *Doe v. Ellis*, 9 East, 382.

(*m*) *Tenny v. Agar*, 12 East, 253.

(*n*) *Dansey v. Griffiths*, 4 M. & S. 61.

"I bequeath to Francis, my son, my houses in London, after the death of my wife; and, if my three daughters, or either of them, do overlive their mother, and Francis their brother and his heirs, then they to enjoy the same houses for term of their lives."—The Court on this will resolved, that the son had but a fee-tail, "for 'heirs,' in this place, is intended heirs of the body; for the limitation being to his sisters, it is necessarily to be intended, that it was, if he should die without issue of his body; for they are his heirs collateral. And, therefore, there is a difference. Where a devise is to one and his heirs, and if he die without heirs, that it shall remain [to a stranger;] it is void, as 19 Hen. VIII., pl. 9; yet when a devise is to one and his heirs, and, if he die without heir, it shall be to his next brother, there is an apparent intention what heirs he intended; and the intention being collected by the will, the law shall adjudge accordingly."(*o*)

[*87] "I devise to my wife all my lands till my heir [the testator *supposing his eldest daughter Susan to be his heir] come of the age of 21. *Item*, I give to Anne and Elizabeth [testator's other daughters] 140*l.* a piece; and if Susan, my heir, die without heirs before 21, so that the land fall to Anne, then Anne shall pay Elizabeth the portion she herself was to have."(*p*)

"I devise, &c., to William Turner for his life, and to his heirs; and, for want of heirs of him, to George Turner for his life, and to his heirs; and, for want of heirs of him, to William Flint [next cousin and heir of William and George Turner,] and his heirs for ever."(*q*)

"I devise, &c., to my eldest son; and, if he dies without heirs male, then to my other son."(*r*)

"I devise, &c., to A. [testator's second son,] after the death of his mother, to hold to him and his heirs for ever; and, for want of such heirs, then to my right heirs."(*s*)

"I devise, &c., to A.; and, if he die without heirs, B., his brother, shall have it."(*t*)

"I devise, &c., to my wife Jane for life; and, after her decease, to my son Henry for life; and, after his decease, to my son George, and his heirs for ever; and, if he dies without heirs, then to my two daughters, Katherine and Jane."(*u*)

"I devise all my lands to my wife Joan for her life; and my will is, that if my son Richard [testator's eldest son] do happen to die without heirs, then my son John shall enjoy my lands."(*v*)

"I give to my son, James Towers, all my estate in the parish of Paddington, and to his heirs; and, in default of *such, to be [*88] equally divided between the heirs of my other children."(*w*)

"I devise, &c., to Thomas Griffiths, my grand-child, for and during his natural life; and, after his decease, to his right and lawful heirs and assigns for ever; and, for want of such lawful heirs, I do give the said lands to Thomas Evan [another grandson of the testator,] his heirs and assigns for ever."(*x*)

(*o*) Webb v. Hearing, Cro. Jac. 415.

(*p*) Tilley v. Collier, 3 Lev. 162.

(*q*) Parker v. Thacker, 3 Lev. 70.

(*r*) Blaxton v. Stone, 3 Mod. 123.

(*s*) Nottingham v. Jennings, 1 P. W. 23.

(*t*) Allen v. Spendlove, 1 Freem. Rep. 74; 2 Eq. Cas. Abr. 305.

(*u*) Tyte v. Willis, Forrest. 1.

(*v*) Goodright v. Goodridge, Willes, 369.

(*w*) Pickering v. Towers, 1 Eden. 142; Amb. 363.

(*x*) Morgan v. Griffiths, Cowp.

"I devise, &c., to my daughter, Marthana Legge, to hold to her own use during the term of her natural life; and, after her decease, the same to go and be enjoyed by the children of her body begotten, and their heirs; and, in default thereof, to my son, William Legge, his heirs and assigns."(y)

"I devise, &c., all my free lands at Creden or Kersoe, to Elizabeth, my wife, for life; and, after her decease, to my son, John Peart, and his heirs for ever: all my lands lying in the parish of Emly Castle, in the county of Worcester, and all my free lands, if it shall happen that my son John shall die unpossessed of them, or without heirs, I give to my daughter, Sarah Peart, and her heirs."(z)

4. *A limitation in fee explained to be determinable in favour of an executory devise.*

A limitation in fee is often explained to be determinable on a contingency; an executory devise over in fee being limited on the contingency.

The devises which follow are of this description:—

"I devise to Sir Edward Cleere, and Frances his wife, my lands in Elden, in the county of Norfolk, to them and the heirs of Sir Edward Cleere, on condition that he assure *certain lands to my [*89] executors and their heirs, to perform my will; and if he fail, then I devise the said lands in Elden to my executors and their heirs."(a)

"I devise, &c., to Thomas my son, and his heirs for ever; and if Thomas dies without issue, living William his brother, then William his brother shall have those lands, to him and his heirs and assigns for ever."(b)

"I devise, &c., to my wife, for life; and after her decease, to my second son Daniel, in fee; provided and nevertheless, that if my third son Nathaniel, shall, within three months after the death of my wife, pay the sum of 500*l.* to Daniel, his executors or administrators, then I devise the land to Nathaniel and his heirs."(c)

"I give and bequeath unto Edward Heath all my messuages in Hemblington and Clofield, for ever: that is, if he have a son or sons who shall attain 21; but if my kinsman, Edward Heath, should chance to die, without son or sons to inherit, my will is, that the son of my son William Heath, shall inherit."(d)

In the devises which follow, the executory devise over is limited on the contingency of *the devisee's dying in his minority*:—

"I devise, &c., to A. and his heirs; provided that if he dies within age, I devise, &c.;" [Remainder over.] (e)

"I devise, &c., to my wife Katherine for her life; and, after her death, to such child as she is now ensient with, and to the heirs of such child for ever; provided, that if such child, as shall happen to be born, shall die before *the age of 21 years, leaving no issue of its body, the [*90] reversion of one-third of the said lands shall go to my wife

(y) *Ives v. Legge*, 3 T. R. 488, note (a).

(z) *Doe v. Bluck*, 6 Taunt. 485.

(a) *Fulmerston v. Steward*, cited Cro. Jac. 592.

(b) *Pells v. Brown*, Cro. Jac. 590. See 3 T. R. 146.

(c) *Marks v. Marks*, 10 Mod. 419.

(d) *Heath v. Heath*, 1 Bro. C. C. 147.

(e) *Hoe and Geril's Case*, cited Palm. 136.

and her heirs; one-third to my sister Elizabeth and her heirs; and the other third to my sister Ann and her heirs.”(f)

“The other two-thirds of all my real estate I give and devise to my son, Matthew Peterson, to hold to him, his heirs and assigns for ever; but my mind and will is, in case my said son shall happen to die before he shall attain the age of 21 years, or without issue, then I do hereby give and devise the said two-thirds of my said estate, to my wife, Martha Peterson, her heirs and assigns.”(g)

“I devise my house, &c., to my son Robert, and his heirs and assigns for ever; and in case he shall happen to die in his minority, and unmarried, or without issue, I give it to my son Harry, and his heirs.”(h)

Robert, the devisee in the last devise, came of age, and married, but died without issue, having left debts by specialty. On the question, what estate he took under the will; “I am clearly of opinion,” said Lord Hardwicke, “this is a fee with an executory devise. This is not like the case of *Soulle v. Gerrard*, Cro. Eliz., 529. Here it is one contingency, of Robert’s dying under age, attended *with two qualifications*, of his being unmarried, or dying without issue. The word ‘or’ has a reference to the different qualifications that may happen during the minority, which are all tied up to Robert’s dying under age; and although the expression ‘*unmarried*’ was unnecessary, yet the mother intended to express her desire, that if he married under age, the estate should vest [*91] so as to entitle the wife to *dower; therefore it is different from Lord Vaux’s case, in Cro. Eliz. 269, because there it appears by what the testator clearly expressed, that he designed by the words to make the several sentences so many contingencies. But it is not a general rule, that a *disjunctive* at the end of a period shall make all the preceding sentences disjunctives, if the intention appears against it. Upon the whole, I think the estate is to go over only upon one contingency, of Robert’s dying during his minority, subject to the qualifications of his being unmarried, and without issue at his death; and, consequently, the estate vested in the plaintiff’s husband, *upon his coming of age*, and is subject to his debts on specialty.”(i)

In the devises which follow, the executory devise over is limited on the contingency of *the devisee’s dying without leaving issue at his death*:—

“I give all my freehold and copyhold lands, after the death of A. [the testator’s heir at law] my executor, to B., his [A.’s] son, and his heirs for ever; but if he [B.] dies leaving no son, then to that son or sons my executor shall think fit to give them to by his last will; which son or sons so nominated (if B. dies as aforesaid) I declare shall have my lands.”(j)

“I give and devise unto my son, Philip Dobin, his heirs and assigns for ever, all that messuage and tenement wherein I now live: but my will is, that in case my said son shall happen to die leaving no issue behind him, then my wife shall receive and take the rents, issues, and profits thereof as long as she shall continue a widow, and no longer; and

(f) *Gulliver v. Wicket*, 1 Wils. 105.

(g) *Walsh v. Peterson*, 3 Atk. 198.

(h) *Framlingham v. Brand*, 3 Atk. 390.

(i) 3 Atk. 390.

(j) *Fairfax v. Heron*, 2 Eq. Cas. Abz. 306, pl. 7.

after her decease, or marriage as aforesaid, *then the lands so devised to Philip, as aforesaid, I give and devise, for want of [*92] issue by him as aforesaid, unto my son, James Dobin, his heirs and assigns for ever.”(k)

“I devise, &c., to my grandson, T. Friswell, and to his heirs for ever; but in case my said grandson shall depart this life and leave no issue, then my will is, that the said dwelling-house, &c., shall be and return to Elizabeth, Mary, and Sarah, the three daughters of W. and M. Friswell, or the survivor or survivors of them, to be equally divided betwixt them, share and share alike.”(l)

“I devise, &c., to my daughter, Susannah Saunders, her heirs and assigns for ever; but if my said daughter shall happen to die leaving no child or children, lawful issue of her daughter, living at the time of her death, then I give and devise all the said copyhold premises unto Francis Barnfield and his heirs.”(m)

“I devise, &c., to my niece, Mary Hiles, her heirs, executors, administrators, or assigns for ever. And my will is, that in case my niece, Mary Hiles, shall happen to die and leave no child or children, then my will is, I give, devise, and bequeath unto my niece, Jane Barnes, all my freehold lands and tenements, to her and her heirs for ever, paying the sum of 1000*l*. to the executors of my niece, Mary Hiles, or to such person as she, by her last will and testament, shall direct.”(n)

“I give and bequeath to my son, William Frost, and his heirs for ever, all my houses and lands, with all their appurtenances thereunto belonging; and if the said W. Frost should have no children, child, or issue, the said estate is, on the decease of the said W. Frost, to become the property *of the heir at law, subject to such legacies [*93] as he, the said W. Frost, may leave by will to any of the younger branches of the family.”(o)

SECTION III.

OF EXPLAINING ONE DEVISE BY ANOTHER.

THE whole will being subservient to make out the intention in a particular devise, it follows that the intention of a devise may be explained by another devise in the will.(p)

In *Browne v. Jerves*, a testator being seised in fee of lands in Reculver, Edington, and Ham, devised in the words: “I devise all my lands to John my son and his heirs, and if he die without issue, I devise my lands in Reculver to Matthew, my nephew, in fee: Item, I devise my lands in Ham to Henry, my nephew, in fee.” It became a question, whether it were a good devise to Henry, by way of remainder, after the

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| (k) <i>Porter v. Bradley</i> , 3 T. R. 143. | 4 M. & S. 58. <i>Macnamara v. Lord Whitworth</i> , Coop. 241. <i>Lady Dacre v. Doe</i> , 8 T. R. 112. See <i>Hopewell v. Ackland</i> , 1 Salk. 239. <i>Cole v. Rawlinson</i> , 1 Salk. 234. <i>Cliffe v. Gibbons</i> , 2 Lord Ray. 1324. <i>Doe v. Westley</i> , 4 Barn. & C. 667. |
| (l) <i>Roe v. Jeffery</i> , 7 T. R. 589. | |
| (m) <i>Doe v. Wetton</i> , 2 Bos. & P. 324. | |
| (n) <i>Doe v. Webber</i> , 1 Barn. & A. 713. | |
| (o) <i>Doe v. Frost</i> , 3 Barn. & A. 546. | |
| (p) <i>Browne v. Jerves</i> , Cro. Jac. 290. <i>Evans v. Astley</i> , 3 Burr. 1570. <i>Fenny v. Ewestace</i> , | |

death of John without issue; or an immediate devise to Henry, and a countermand of the devise to John of those lands. And it was resolved, "that it was a limitation by way of remainder to Henry, and no countermand; for the words, 'Item, I devise,' &c., shall be construed, that if John die without issue, then the land should remain as the devise was made to Matthew; and the first limitation to John is, as to him and his heirs of his body, and no fee, and so all the clauses *of the [*94] will stand together." (q) In *Evans v. Astley*, Sir Samuel Daniel devised:—"to Samuel Duckenfield, my godson, and son of Charles Duckenfield of Mobberley, in the county of Chester, Esq. during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to Charles Duckenfield, another of the sons of the said Charles Duckenfield, Esq. during his natural life, and to the heirs male of his body lawfully to be begotten; and for want of such issue to John Duckenfield, another of the sons of the said Charles Duckenfield, Esq. during his natural life, and to the heirs male of his body lawfully to be begotten; and for want of such issue, then to *every son and sons* of the said Charles Duckenfield, Esq. which shall be begotten of the body of Sarah his now wife; and *for want of such issue*, then to William Hutton, of the city of Chester, during his natural life, and the heirs male of his body lawfully to be begotten, and want of such issue, then to Samuel Goldston, of East-Ham, in the county of Essex, my godson, for and during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, then to James Goldston, brother of the said Samuel Goldston, during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to my own right heirs for ever." The will contained a proviso, obliging "the said Samuel Duckenfield and others as aforesaid," to take the name, and use the arms of the Daniels. Samuel, John, and Charles Duckenfield, the three sons of Charles Duckenfield of Mobberley, all died without issue. But Charles Duckenfield of Mobberley had a fourth son, named William, born after the date of the will. It became [*95] a question, what estate this William *Duckenfield took under the will; and it was determined that he took an estate-tail. "It cannot be supposed," said Mr. Justice Yates, "that the testator meant a less benefaction to these unborn nephews, than to the three devisees, his nephews, who were in being. The clauses and circumstances prove his intention to be equal and the same to *all*." (r) Lord Kenyon has observed on this case, it being cited before him:—"As to the case of *Evans v. Astley*, the estate was limited in formal terms to the three first sons of the devisor's sister, and 'to the heirs of their bodies;' and, in the limitation to the fourth son, 'these words were omitted: but afterwards, when the devisor was directing what was to be done in conformity to his will, he took it for granted that an estate of inheritance was given to the fourth son, for he directed the sons of that fourth son to take his name and arms. And I remember that in determining that question the Court considered the rule adopted by Lord Hale *noscitur à sociis*; which was no pedantic or inconsiderate expression when falling from him, but was intended to convey, in short terms, the grounds upon which he formed his judgment." (s) The kindred terms,

(q) Cro. Jac. 290.

(r) 3 Burr. 1570.

(s) See 8 T. R. 116.

to which the Court referred in *Evans v. Astley*, were the limitations to all the other brothers, and a requisition that the devisor's name and arms should be borne by them and their descendants. And the devisor could not be supposed to have intended that the estate, which was the substance, should go one way, and the arms and name, which were the shadow, another."(*t*)

In *Fenny v. Ewestace*, a testator devised:—"First, to his wife all his household goods, &c., to her and her heirs for ever; also he gave to his wife, three cow-commons, to her and her heirs for ever; 2dly, To his nephews, John *and Thomas Collings, all that piece of land [*96] called Priestlands; also he gave to his nephews, J. and T. Collings, all that piece of land called Longland, to be equally divided between them, as tenants in common, and to their several heirs and assigns for ever: '3rdly, (he devised) *I give unto my nephew, John Collyer, all that my house and premises at Pitston, in the occupation of R. Read; I also give unto my nephew, John Collyer, all that my land in the parishes of Piddleston and Aubury, in the occupation of J. Tomkins, to him my said nephew John Collyer, his heirs and assigns for ever.*' 4thly, he gave to his brother, F. Collyer, one shilling a week for his life, for the payment of which he charged the house and premises in the occupation of R. Read." It was held, that John Collyer took a fee in the house and premises, as well as in the land. "Undoubtedly," said Lord Ellenborough, "if there be nothing in the context to connect the different clauses of a will together, they must be taken separately; but does not the arrangement in this will point out the connection which the testator intended; namely, a numerical order, connection, and division, between the several clauses of the will? In some of the clauses, he reserves the main sense in respect of the quantum of interest to the last; he says, he gives such lands to the particular devisee, and also such lands; and then, at the last, he states what the quantum of interest is that he gives. This is a question for a grammarian, rather than a lawyer, or which a schoolmaster might decide as well as a judge. If it had not been for the numerical arrangement, there might have been some difficulty; but that removes it. It seems clear from the context, that both in the second and third clause, the testator, by reserving to the close of the entire sentence the words of limitation, meant to accumulate and comprehend within those words all that he had disposed of *in the [*97] preceding parts of the sentence. Therefore, it appears to me, that J. Collyer took under this devise an estate in fee." And Le Blanc, J.—"I think the numerical divisions clearly show, that by the phraseology which the testator has used, both in the second and third clauses, he meant to describe, first the persons and the property which were the subjects of his devise, and to wait until the end to point out the estate he devised."(*u*)

(*t*) 3 T. R. 86.

(*u*) 4 M. & S. 58.

[*98]

*CHAPTER XII.

IF PRACTICABLE, EFFECT IS TO BE GIVEN TO ALL THE WORDS IN A WILL.

THE words in a will are the means to collect the testator's intention. In general cases, it is reasonable to suppose the testator has not unmeaningly used any of his words. An exposition, therefore, of a will, which gives effect to every word in it, appears, whenever practicable, to be the safest and best. It has been said by Lord Kenyon, "certain rules have been for a long time established, respecting the construction of wills, which we must not abandon; one is, that we must, if possible, give effect to *all* the words of the will." (a) "I cannot," said the Lord Chief Justice Abbott, in a late case, "reject from a will any word, unless I see that the meaning to be given to that word is contrary to some intention plainly expressed in other parts of the will." (b) And Mr. Justice Holroyd, in the same case:—"Now, I take it to be a rule of law, that we are not to reject any words in a will, unless it be to carry into effect the intention of the testator, apparent from the rest of the will." (c)

A person devised "to the use of his two nephews, and the survivor of them, and their heirs, equally to be divided between them, share and share alike." "It is a certain rule," said Lord King, on this devise, "in the exposition of wills especially, that every word shall have its effect, and not be rejected, if any construction can possibly be put upon it; and here I think there may; the first part of the devise, being to two, and the survivor of them, makes them plainly joint-tenants for life, and [*99] therefore they shall *be so taken; and then as to the next words, 'and to their heirs, equally to be divided between them, share and share alike,' they are plainly words importing a tenancy in common, and shall operate accordingly, so as to make them tenants in common of the inheritance, by which construction of the will *every word* takes effect." (d) A person devised to his three sisters, "for and during their joint natural lives, and the natural life of the survivor of them; to take as tenants in common, and not as joint-tenants; and from and after the determination of their respective estates," [remainders over.] The devisees were held, in this case, to take as tenants in common with benefit of survivorship. "The fair construction," said Mr. Justice Bayley, "is to treat it as a devise to the sisters as tenants in common, with benefit of survivorship, and thereby give effect to *all* the words." (e)

[*100]

*CHAPTER XIII.

OF TWO INTENTIONS, THE CHIEF IS TO BE CARRIED INTO EFFECT, IF BOTH CANNOT.

THE whole will is, if possible, to be carried into effect. (a) If the law cannot fulfil the *whole* intention of the testator, it will *as much of it as*

(a) 8 T. R. 582.

(b) 2 Barn. & A. 448.

(c) Ibid. 451.

(d) Barker v. Giles, 2 P. W. 280.

(e) Doe v. Abey, 1 M. & S. 428.

(a) Barker v. Giles, 2 P. W. 280. Doe v. Bell, 7 T. R. 579. Doe v. Abey, 1 M. & S. 428.

it is able.(b) In particular, if there are *two* intentions in a will, *both* of which *cannot*(c) be effected, the law will, *in the best manner it is able*,(d) fulfil the one it considers to be the *chief* intention in the will.(e)

In *Godolphin v. Godolphin*, the testator devised in the words: "I devise, &c., to my sister, Mary Dixie, and her heirs for ever; and my will is, that the said Mary Dixie, whom I make sole executrix, shall in six months' time after my decease by some writing or good assurance in the law, settle so much of my estate as shall remain, after debts and legacies paid, on my brother R. for life, and on my sister E. for such time of her life as she shall be a widow, if she survives her husband; and, from and after their decease, on any other person or persons for their several lives, who are or shall be hereafter at any time descended from my mother, as my said sister shall think fit; in such manner and proportion, and subject to such rules and directions, as she shall in her discretion order and *appoint; and she may at any time during her [*101] life make void or change any appointment, and appoint or nominate any other new person to have and receive such profit and advantage out of my estate, as she shall think fit; provided it be to the descendants of my mother: because it is my desire, that my estate should continue to persons always descended from my mother; and, for this purpose, I advise that a writing may be made to trustees for 99 years, to the uses aforesaid. If she dies without executing the power, then my brother R., within six months after her decease, may do it; and, on his dying without executing, any other relation shall appoint, with the consent of the Lord Chancellor for the time being."

The devisee, within six months after the testator's death, appoints with power of revocation; afterwards marries, and revokes, and limits new uses to trustees, to permit W. Godolphin, one of the plaintiffs, and a descendant of the mother, to receive the profits for his life, remainder to the first, &c., son, and the heirs male of such sons; and in the same manner to some other descendants of the mother, with a remainder to the right heirs of the mother.

The bill was, to have the benefit and establishment of this settlement; and the general question was, whether the devisee had power by the will to limit an inheritance. Lord Hardwicke: "From the tenor of the will, though not from the words, the testator's intention appears to have been, to provide for the younger branches of his mother's family: and, therefore, he gives nothing to the elder brother. He had great confidence in, and regard for his sister, and seems to have given her this power of revocation, to keep the rest of the family depending on her. I do not doubt but he might intend a succession of freeholds; and the words 'who are or shall be, &c.' look that way. The words 'manner and proportion' carry it *no farther than for life; nor 'such profit as she shall think fit;' otherwise she would have a greater power [*102] under the revocation than under the power itself. But the words on which I lay greater weight, and which I think enlarge the power to give

(b) *Humberston v. Humberston*, 1 P. W. 332, 2 Vern. 737. *Hutton v. Simpson*, 2 Vern. 723. *Wollen v. Andrewes*, 2 Bingh. 126.

(c) *Godolphin v. Godolphin*, 21 Ves. 1; 8 T. R. 9; 5 East, 207.

(d) 1 Ves. 23. 4 T. R. 87. 5 T. R. 303. 8 T. R. 10.

(e) *Godolphin v. Godolphin*, 1 Ves. 21. *Robinson v. Robinson*, 1 Burr. 38.

a greater estate than for life, are, 'I advise that a writing,' &c. His *principle* intent is, that his estate shall continue to persons descended from his mother. This clue directs us through the will; and whatever is *the best method* for executing this intention must be taken, as far as the rules of law will allow. The objections are, that she [the donee of the power] has not confined herself to estates for life; and has limited to the right heirs of the mother. I am of opinion, that she had a right to go beyond estates for life. In *Humberston v. Humberston*, the words 'for life' are annexed to every person that is to take; and the negative exclusive word 'only,' in every clause; yet in that case an inheritance was decreed. So here the intent, that it should always continue in descendants of the mother, cannot take place without limiting an inheritance. The question therefore, is, whether the words 'for their several lives' shall control the general intent. I think not. It is true, this will put in the power of a common recovery; but then, unless an inheritance be some time or other created, it will be impossible it should go in the line the testator intended. As in *Shaw v. Weigh*, Eq. Ab. 185, where it was resolved in B. R. to be an estate for life; but by the Lords, that it was an estate-tail; because, though the other construction would preserve it longer, yet it would turn it out of the line." (f)

Robinson v. Robinson, was a case sent out of Chancery (g) for the opinion of the court of King's Bench on the following *devise: [*103] "I bequeath all my real estate to Lancelot Hicks of Plymouth, in the county of Devon, gentleman, for and during the term of his natural life, and no longer; provided that he alter his name, and take that of Robinson; and, after his decease, to such son as he shall have, lawfully to be begotten, taking the name of Robinson; and, for default of such issue, then I bequeath the same to my cousin William Robinson and his heirs for ever. Item, my will and desire is, that he [William Robinson] have liberty to present whom he pleases to any vacancy that shall happen in any of my presentations during his life; and, in case any of his children shall take or be designed for holy orders, then it is my desire that, in case of any vacancy in either of my presentations, bonds of resignation be taken to such child or children, if the vacancy happen before he or they attain such orders: and, after the same shall be disposed of as aforesaid, then I give the perpetuity of the said presentations to the said Mr. Lancelot Hicks, in the same manner, and to the same uses, as I have given my estate." Lancelot Hicks took the name of Robinson; and, after the testator's death, had two sons, George and Edmund. George died in the life-time of his father. On the death of the father, leaving Edmund surviving him, it became a question what estate the father, Lancelot Hicks, took under the will. The court of King's Bench unanimously certified in these words: "We are of opinion, that, upon the true construction of the said will of the testator, George Robinson, the said Lancelot Hicks must, by necessary implication, to effectuate the manifest *general* intent of the said testator, be construed to take an estate in tail male, he, and the heirs of his body, taking the name of Robinson; *notwithstanding* the express estate devised to the said Lancelot Hicks 'for his life and no longer.'" (h)

(f) 1 Ves. 21.
(g) 3 Atk. 736.

(h) 1 Burr. 38.

*Robinson v. Robinson has been the leading authority [*104] in the exposition of the devises which follow, in all of which, the person clearly intended by the testator to be a tenant for life only, has been held to take an estate-tail.—

"I give, devise, and bequeath to my nephew, George Grew, all my lands [naming them particularly;] to hold the same, with their appurtenances, to him the said George Grew, for and during the term of his natural life; and, from and after his decease, to the use of the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male, and, for want of such issue male, then I give all and every the aforesaid premises to my nephew, George Dodson, his heirs and assigns for ever."⁽ⁱ⁾

"I give and bequeath to my nephew, William Dymock, all that my freehold estate situate at Alhampton; to hold to him during his natural life; and, after his decease, to and amongst his issue; and, in default of issue, to be divided between my nephew, Elias Dymock, and my niece, Mary Dymock, and to their heirs and assigns for ever."^(j)

"I devise, &c., to my grandson, Nicholas Webb, for life, without impeachment of waste; and, after his decease, to the issue male of his body lawfully begotten, and to the heirs and assigns of such issue male forever; and for default of such issue male," [remainders over.](k)

"I hereby give and devise all my freehold messuages, land, &c., to my daughter, Mary Ascough, and the heirs of her body lawfully to be begotten, for ever, as tenants in common and not as joint-tenants; and, in case my said daughter shall happen to die before 21, or without leaving issue of her body lawfully begotten, then I give *and devise all those my said freehold messuages, lands, &c., to R. As- [*105] cough, his heirs and assigns for ever."^(l)

"I give, devise, and bequeath to Richard Cock, son of my sister, Elizabeth Cock, deceased, all that messuage or tenement and lands in Cowfold in the county of Sussex; to have and to hold to my said sister's son, Richard Cock aforesaid, for the term only of his natural life; and, after his decease, I give and devise the same to the lawful issue of the said Richard Cock, as tenants in common; but, in case the said Richard Cock shall die without leaving lawful issue, then and in such case, after his decease, I give and devise the same to Elizabeth Harding, and to her heirs and assigns."^(m)

"I give and bequeath to my nephew, Bacon Frank, all my estates whatsoever in the county of York; to hold to the said B. Frank, for the term of his natural life, without impeachment of waste, and with power to make a certain jointure thereout for any future wife; and, from and after his decease, then to the use of the issue male of the body of my said nephew B. F., lawfully begotten, or to be begotten, and their heirs; and in default of such issue," [remainder over.](n)

"I devise, &c., to my daughter Ann, and to the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common and not as joint-tenants; and, in default of such issue," [remainder over.](o)

(i) *Roe v. Grew*, 2 Wils. 322. See 7 T. R. 534.

(j) *Doe v. Applin*, 4 T. R. 82.

(k) *Denn v. Puckey*, 5 T. R. 299.

(l) *Doe v. Smith*. 7 T. R. 531.

(m) *Doe v. Cooper*, 1 East, 229.

(n) *Frank v. Stovin*, 3 East, 548.

(o) *Pierson v. Vickers*, 5 East, 548.

I devise, &c., to my nephew, Thomas Chapman, for and during the term of his natural life; [remainder to trustees to preserve contingent remainders;] and from and after the decease of my said nephew, Thomas Chapman, then I give and devise the same to and amongst all and every [*106] the *heirs of the body of the said Thomas Chapman, as well female as male, lawfully to be begotten, such heirs, as well female as male, to take as tenants in common, and not as joint-tenants; and for default of such issue," [remainder over.](p)

"I devise, &c., to Henry Astley Bennett, and his assigns, for and during the term of his natural life, without impeachment of waste; and, from and after his decease, to the heirs of his body, to take as tenants in common, and not as joint-tenants; and in case of his decease without issue of his body, to Lord Ossulton, his heirs and assigns for ever."(q)

The character of all these cases is, that there are two intentions in the will, both of which, it has been considered, the law cannot carry into effect. The one intention is, to give to one person a life-estate only; the other, to give to another person a remainder, but not before all the issue of the tenant for life are extinct. The latter the law considers to be the *chief* intention of the testator; and, *as the best means(r)* to fulfil the chief intention, it gives to the tenant for life an estate-tail.(s)

[*107]

*CHAPTER XIV.

THE INTENTION AT THE TIME THE WILL IS MADE CAN ALONE BE EFFECTED.

THE law will not fulfil an intention which is not expressed in the will.(a) It is, therefore, the intention of the testator at the time he makes his will, which alone the law will carry into effect. Events, which have happened since the publication of a will, are unavailable to introduce an intention into it. It is legal, nevertheless, to anticipate in a will many events which may happen, and to provide for them. There is, it is apprehended, the distinction, that the *effect* of a will may be changed by events which have happened since it was published, as in the instances of lapsed devisees, and devisees on contingencies; but not the *intention*; for then it would not be the intention expressed in the will.

It is often said, that "the intent of a testator is to be taken as things stood at the time the will was made."(b) This position is scarcely correct. At least, it does not admit of universal application. For, indis-

(p) Doe v. Harvey, 4 Barn. & C. 610.

(q) Bennett v. Earl Tankerville, 19 Ves. 170.

(r) 4 T. R. 87. 5 T. R. 303. 8 T. R. 10.

(s) Doe v. Halley, seems to be a farther case professedly determined on the authority of Robinson v. Robinson; yet *both* intentions of the testator appear to be fulfilled in it. The devise is "to my nephew, Michael Halley, and his assigns, for and during the term of his natural life, without impeachment of

waste; and, from and after his decease, to the eldest son of my said nephew, M. Halley, lawfully to be begotten, and to the heirs of such eldest son; and in default of issue male of my said nephew" [remainders over.] Under this will, it was held that Michael Halley took an estate for life, remainder to his eldest son in tail-male, remainder to himself in tail-male.—(8 T. R. 5.)

(a) 3 Burr. 1541. 1 T. R. 201. 3 T. R. 85, 86.

(b) Willes, 297. 5 Barn. & C. 69.

putably, a testator is at liberty, in many instances, to anticipate events. All devises in contingency depend on this liberty. If a termor for years devises his land, his term, or his lease; unless a contrary intention appears in the will, he is, indeed, understood to mean to devise only the interest he possesses in the land when the will was made; and if he afterwards takes another lease of the same land, the lease taken after the making of the will, will not pass by *it(c). But it is legal [*108] to anticipate a new lease for years, and the termor is at liberty to devise his present lease; and also, if he pleases, prospectively any future lease for years he may have of the same land; and if the lease, subsisting when the will is made, determines before his death, and a new lease for years is taken, it will pass by the devise, although renewed after the making of the will.(d) In this instance it can scarcely be said, that the intent of the testator is taken "as things stood at the time the will was made," and yet, as the particular event may legally be anticipated, the devise is valid.

It has been said by Lord Hardwicke, and it is often repeated, that "a will must be made to speak from the testator's death, and be looked upon not only as his last will, but last words.(e) It is true, that a will speaks from the death of the testator; but what does it speak? Does it say more than what the testator said when he made his will? Were it permitted to say more, clearly the law would fulfil an intention which is not expressed in it.

*CHAPTER XV.

[*109]

OF PRESUMING THE TECHNICAL EFFECT OF THE WORDS IN A WILL TO BE INTENDED.

SECTION I.

THE technical effect of the words in a will is presumed to be intended, if a different intention does not appear in the will.(a)

OF THE WORD HEIRS.

A testator may, if he pleases, make the word *heirs* a word of purchase;(b) but, technically, it is a word of *descent*.(c)

If a testator devises simply to the heirs of A., it is evident that, as he does not devise to A. himself, the heirs of A. cannot take from him by descent; for to descend, the estate must come from A. at his death.(d) In this case, therefore, the heirs of A. must take, if at all, by purchase.(e)

(c) 6 Madd. Rep. 83, 84.

(d) 2 Atk. 599. Colegrave v. Manby, 6 Madd. Rep. 73.

(e) 1 Ves. 53. 1 T. R. 204.

(a) 1 Salk. 238. Doug. 327. Amb. 377.

1 Bro. C. C. 221. 1 Bos. & P. 57.

(b) Watk. Desc. 170.

(c) 2 Ld. Raym. 1440.

(d) Co. Litt. 13 b.; 18.; 237 a.

(e) Watk. Desc. 156.

The effect will be the same if the limitation is not to the heirs *general*, but to the heirs of the body of A. (f) When heirs take by *purchase*, they do not take *as heirs*; but as a class of persons, whom, by that name, the testator has selected to devise his property to. (g) Whenever an heir takes *as heir*, he takes by *descent*. (h)

[*110] *There appears formerly to have been this distinction between purchase and descent on a limitation in tail;—that if “heirs of the body” were words of descent, then *all* the issue of the ancestor might take under the limitation; but if of purchase, then, although there were many sons, the eldest alone, and his issue, would be heirs, and the younger sons never could take under the limitation. The occasion of the rule in Shelley’s case, has been attributed to this distinction by the Lord Chancellor Parker. “The reason of that case,” he observes, “was, for that if the estate-tail had vested in the eldest son by purchase, and that ‘heirs male of the body’ should have only been a description of a person, that then, if he had died without issue, there had been (as was then held) an end of the estate-tail, and none of the younger sons could have succeeded to it; but this has been held otherwise since that time, and a judgment in point, in Carter’s Reports, that the estate-tail should go to all the sons successively, notwithstanding its vesting in the eldest son by purchase.” (i) The distinction, therefore, is now no longer admitted; and where heirs of the body take by purchase, all the issue of that body are, successively, as much entitled to inherit, as if the estate had been limited to their ancestor, and they derived their title by descent from him. On the failure of the issue of a first son, the entail will devolve on the second son and his issue. Mandeville’s case is in point. John de Mandeville by his wife Roberge had issue Robert and Mawde. Michael de Moreville gave certain lands “to Roberge and to the heirs of John Mandeville, her late husband, of her body begotten;” and it [*111] was adjudged, “that Roberge had an estate but for life, and the fee-tail vested in Robert (heirs of the body of his father being a good name of purchase,) and, that when he died without issue, Mawde the daughter was tenant in tail, as heir of the body of her father, *per formam doni*.” (j) It is observable, that, as Mawde did not claim by descent from her brother, she would have been entitled to the entail at his death without issue, although she had been of the *half-blood* to him. Her claim was as a *purchaser per formam doni*. (k)

When an heir takes land by purchase, he is capable of transmitting it to his *own* heirs, without any *actual* seisin in himself; but, when he takes by *descent*, although the estate descended is, for many purposes, sufficiently vested in him before his own actual seisin: yet it is indispensably requisite that he be *actually* seised of the estate so descended, in order to make *himself* the stock of descent or *terminus*, and by this means, the estate descendible to his *own* heirs. For, if he dies before entry, or other actual seisin obtained, the brother of the half-blood will succeed to the inheritance, in exclusion of the sister of the whole, as the

(f) See Sndg. Gilb. Uses, 3d edn., §6, note (8).

(g) Co. Litt. 3 b.; 18 b. Watk. Desc. 156.

(h) 1 Bro. C. C. 220.

(i) 1 Eq. Cas. Abr. 390. See 8 T. R. 519; and Sndg. Gilb. Uses, 3d ed. §6, note (8).

(j) Co. Litt. 28 b.

(k) Ibid, note (3).

person claiming must make himself heir to him who was last *actually* seised. (l)

SECTION II.

OF THE RULE IN SHELLEY'S CASE.

THE rule in Shelley's case is: "When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail: *that always, in such cases, the word 'heirs' is a word of limitation of the estate, and not a word of purchase." [*112]

This rule has obtained in the exposition of wills, where the two limitations have been immediately together: as in the following devise:—

"I devise, &c., to (trustees,) to all the uses, intents and purposes hereinafter mentioned, that is to say: first of intent and purpose, that they shall permit and suffer George Ramsden, my son, to have, receive, and take the rents, (n) issues, and profits of the said messuages, &c., for and during the term of his natural life; and, after his decease, shall stand seised thereof, to the use of the heirs of the body of the said George, my son, lawfully begotten and to be begotten; and, for default of such issue," [remainders over.](o)

The effect of the two limitations has been the same, where, on the devise to the heirs, a farther limitation to *their* heirs has been added; as on devises in the words:—

"I devise, &c., to Nicholas Lisle, for his life; and, after his decease, to the heirs male of the body of the said Nicholas, lawfully to be begotten, and his heirs for ever; but, if the said Nicholas Lisle should happen to die without such heir male," [remainders over.](p)

"I devise, &c., to my nephew, William Legate, for and during the term of his life; and, after his decease, to the heirs male of the body of my said nephew, and the heirs male of the body of every such heir male, severally and successively, as they shall be in priority of birth; and, for want of such issue," [remainders over.](q)

"I give and bequeath to my daughter Lucretia, wife of G. Andrews, all my plantation, &c., during the natural [*113] life of my said daughter. Item, I bequeath to the heirs of the body of my said daughter Lucretia, begotten or to be begotten, and to his or her heirs for ever, after my said daughter's decease, all my before-named plantation, &c.; but, for want of such heirs of the body of my said daughter, I give and bequeath the aforesaid premises, after the decease of my said daughter, to my own next heirs, and their heirs for ever."(r)

The rule in Shelley's case has, secondly, obtained, where the limita-

(l) Watk. Desc. 23, 42.

(m) 1 Co. 104. Co. Litt. 22 b.; 319 b.

(n) See 1 Ves. 154.

(o) Broughton v. Langley, 2 Ld. Raym.

873.

(p) Goodright v. Pullyn, 2 Ld. Raym.

1437.

(q) Legate v. Sewell, 1 P. W. 87. See

2 Ves. 657.

(r) Morris v. Ward, cited 8 T. R. 518.

tion was to the heir (in the singular number)(s) of the devisee; as in these devises:—

"I devise, &c., to A. for life; and, after his decease, to the next heir male; and, for default of such heir male" [remainder over.](t)

"I devise, &c., to A., and B. his wife, for their lives; and, after their decease, to the next heir male of their two bodies."(u)

"I devise, &c., to my son, Thomas Trollope, for life; and after to the first heir male of his body lawfully begotten. For want of such heir male," [remainders over.](v)

The rule has, thirdly, obtained, where a limitation has intervened between the limitation to the devisee and the devise to the heirs; as in the following devise:—

"I devise, &c., to A. for his life, without impeachment of waste; and, from and after the determination of that estate in A.'s life-time, to (trustees) and their heirs, during the life of A., to preserve contingent remainders; and from and after the determination of that estate, to the heirs of the body of A."(w)

In *Colson v. Colson*, a person devised "to Robert Colson for his life, remainder to A. and B., and their heirs, to support contingent remainders, during the life of Robert Colson, remainders to the heirs of the body of Robert Colson, lawfully begotten."(x) It became a question, in a suit in Chancery on this will, whether Robert Colson took an estate for life or in tail; and Lord Hardwicke referred the point to the Judges of the court of King's Bench, who returned their certificate in these words: "We have heard counsel in the question referred by your Lordship to us; and, as it appears by the state of the case, there is, after the determination of the estate for life to Robert Colson, a devise to Isabell, his daughter, and to Ralph Robinson, and their heirs, for and during the life of Robert Colson. We are of opinion, that by reason of the remainder interposing between the devise to Robert for life, and the subsequent limitation to the heirs of his body, the said Robert took an estate for life, not merged by the devise to the heirs of his body, but by that devise an estate-tail in remainder vested in the said Robert."(y) A certificate in *Hodgson v. Ambrose*,(z) on similar limitations, is to the same effect.

The rule in *Shelley's case* has, farther obtained, where an estate to the ancestor has been *implied*(a) only. The rule is applicable, also, on devises of *equitable*(b) estates.

[*115]

*SECTION III.

OF THE WORD ISSUE.

A TESTATOR may make *issue* a word of descent, but, in its technical

(s) See 2 Ves. & B. 371.

(t) *Burley's Case*, cited 1 Vent. 230.

(u) *Miller v. Seagrave*, cited Rob. Gav. 3d ed. 122.

(v) *Dubber v. Trollope*, Amb. 453.

(w) *Papillon v. Voica*, 2 P. W. 471.

(x) 2 Atk. 246.

(y) *Ibid*, 250.

(z) Doug. 323.

(a) *Hayes v. Foorde*, 2 Bl. 698.

(b) *Rale v. Coleman*, 1 P. W. 142. *Garth v. Baldwin*, 2 Ves. 646. *Wright v. Pearson*, Amb. 358. *Austen v. Taylor*, *ibid*, 376. *Jones v. Morgan*, 1 Bro. C. C. 206. *Philips v. Brydges*, 8 Ves. 120.

meaning, it is a word of *purchase*.(c) It has been construed as a word of purchase in the cases cited in the margin.(d) In *Cook v. Cook*, there was a devise, 'to the issue of J. S.,' who, at the death of the testator, had a daughter living, and afterwards had a son born. The question was, who should take, and what estate. The Lord Keeper: "All the children shall take, and even grandchildren, if there had been any; but they shall take only an estate for life. And although the devise is to the issue begotten, that makes no difference; the words 'begotten,' and 'to be begotten,' are the same, as well upon construction of wills, as settlements, and take in all the issue after begotten. And, although upon the death of the testator, there was then only a daughter born; yet, upon the birth of another child, the estate shall open, and take in the after-born son."(e) In *Lodding v. Kime*, Sir Michael Armin devised 'to A. for life, without impeachment of waste; and, in case he have any issue male, then to such issue male, and his heirs for ever; and if he [A.] die without issue male, then to B. and his heirs for ever.' A. entered, and died without issue. On the question, whether A. was tenant in tail by this devise, "Powell, J., held the express estate *for life not destroyed [*116] by the implication that arose on the latter words following: [*116] so that A. was only tenant for life; and the rather, because these words, 'impeachment of waste,' and, 'for life' must in that case be rejected, *quod* Treby, C. J., *concessit*. Secondly, the Court held, that 'issue' was to be taken here, as *nomen singulare*, because the inheritance was annexed and limited to the word issue; so that the inheritance was in the issue, and not in A., the father. Thirdly, that this limitation to the issue was not an executory devise, being after a freehold, but a contingent remainder. Fourthly, that the remainder, limited to the issue of A., was a contingent remainder in fee; and that the remainder to B. was a fee also; but those fees are not like one fee mounted on another, nor contrary to one another, but two concurrent contingencies, of which either is to start, according as it happens; so that these are remainders contemporary, and not expectant one after another."(f) In *Doe v. Collis*, a person devised "to his daughters, Eleanor Newsom, and Susannah, the wife of William Head, to be equally divided between them, not as joint-tenants, but as tenants in common; namely, the one moiety, or half part thereof, to his daughter, Eleanor Newsom, and her heirs, for ever; and the other moiety to his daughter, Susannah, the wife of William Head, during the term of her natural life; and, after her decease, to the issue of her body lawfully begotten, and their heirs, for ever." William and Susannah Head had three daughters. It was held, that the testator used issue as a word of purchase, and, consequently, that Susannah Head took only an estate for life, and her children, as purchasers, a fee-simple.(g) In *Merest v. James*, John Pearson devised to trustees as follows: "To the use of my daughter, Eunice Anna Pearson, for and during her natural life, and from, *and immediately after her decease, then [*117] to the issue of her body lawfully begotten; and in default of [*117]

(c) 2 Ld. Raym. 1440. 3 Atk. 582. 4 Atk. 397. *Bruce v. Bainbridge*, 2 Brod. & T. R. 299. 6 Co. 17 b. 2 Vern. 546. B. 123.

(d) *Cook v. Cook*, 2 Vern. 546. *Lodding v. Kime*, 1 Salk. 224. 1 Ld. Raym. 203. *Doe v. Collis*, 4 T. R. 294. *Merest v. James*, 1 Brod. & B. 484. See also 3

(e) 2 Vern. 545.
(f) 1 Salk. 224.
(g) 4 T. R. 294.

issue, or in case none of such issue live to attain the age of 21 years," [remainders over;] and it was held that Eunice Anna Pearson took an estate for her life only under this will.(h)

SECTION IV.

OF THE WORD SON.

A TESTATOR may make *son* a word of descent, but, in its technical meaning, it is a word of *purchase*.(i) It has been construed as a word of *purchase* on a devise, "to my brother Henry, and his first and every other son in tail male: failure of such issue, to my brother Edmund, and his first and every other son in tail male; [remainders over;] in all the foregoing cases, without impeachment of waste, other than wilful. The renewals to be made by the tenant for life. I name for the executors, in trust of this my will, Mrs. A. J., my brother Henry Phipps, or whichever of my brothers may succeed to the estate." The testator's brother, Henry, was held to take under this will a life estate only, with a remainder in tail to his issue.(j)

SECTION V.

OF THE WORD CHILDREN.

A TESTATOR may make *children* a word of descent, but, in its technical meaning, it is a word of *purchase*.(k) *It has been [*118] construed as a word of purchase on devises in the words:—

"I devise, &c., to A., and B. his wife, and, after their decease, to their children."(l)

"I give my messuage, &c., to my son, Jeffrey Laming, for his life, and, after his death, unto all and every his children equally, and to their heirs."(m)

"I devise, &c., to my niece, Dorothy Comberbach, wife of my nephew, James Comberbach, for life; [remainder to trustees, to preserve contingent remainders; remainder] to all and every the children of Dorothy Comberbach, begotten, or to be begotten, of her body, by my nephew, James Comberbach, and their heirs, for ever, to be equally divided between and among such children (if more than one,) share and share alike; but if only one child, then to such only child, and his or her heirs for ever."(n)

"I devise, &c., to the use of my son, Thomas Grace, for his life; and,

(h) 1 Brod. & B. 484.

(i) 5 T. R. 323, 324; See 2 Barn. & C. 532.

(j) Doe v. Lord Mulgrave, 5 T. R. 320.

(k) 6 Co. 16 b; 17, 17 b. 2 Atk. 222. 2 Vern. 545. 5 T. R. 323.

(l) Wild's Case, 6 Co. 17. See Goodwin v. Goodwin, 3 Atk. 370.

(m) Goodwright v. Dunham, Doug. 261.

See Fearn, Con. Rem. 375.

(n) Doe v. Perryn, 3 T. R. 484.

after his decease, to the use of all the children of the body of my said son lawfully issuing (but exclusive of his eldest son, in case of there being two or more such children besides him,) their heirs and assigns, for ever, as tenants in common, and not as joint-tenants; but in case my said son should depart this life without leaving any lawfully begotten child or children, or issue of any such child or children, then, after his decease, to the use of my daughters, Ann Smith and Mary Smith, and their heirs, as tenants in common.”⁽ⁿ⁾

“I devise, &c. to my daughter, Mary, and to all and every the child and children, whether male or female, of her body lawfully issuing; and unto his, her, and their *heirs or assigns for ever, as tenants [*119] in common, and not as joint-tenants.”^(o)

SECTION VI.

OF THE WORD ESTATE.

THE technical meaning of the word *estate* is ownership of land: the popular meaning of it is, undoubtedly, the *land itself*. The interpretation which this word, when used in a will, is to receive, became a question in *Wilson v. Robinson*,^(p) and *Carter v. Horner*;^(q) but in neither is the point decided; it is only argued. It appears to have been first^(r) decided in the subsequent case of the Countess of Bridgwater v. the Duke of Bolton,^(s) where it is determined, that in a will, if a different intention does not appear,^(t) the word ‘estate’ is interpreted to mean not only land, but the owner’s property in land; and, therefore, if a person devises his *estate*, the land, and all his interest in it, whether in fee, *pur autre vie*, or for years, will pass under that technical word. The question in the Countess of Bridgwater v. Duke of Bolton, arose on the devise of a residue in the words, “all other my estate, real and personal;” and the Lord Chief Justice Holt, in giving judgment, explained, at some length, the technical meaning of the word estate. “The word estate,” he said, “is a *genus generalissimum*, predicable of two species that have their difference, whereby they are divided, that is, estate real, and estate personal. Estate real is *genus subalternum*, and has its species too; that is, estate real in fee, or *for life. And so is estate [*120] personal, in like manner, to be branched into chattel real and chattel personal; and it has that difference of a chattel real, not because it is a real estate, but because it has a real extraction. A man, seised in fee, makes a lease for years; lessee for years has a chattel real, because his estate is derived out of a real estate; but still it is not a real estate, for it is a testamentary, and devisable by will, at common law, by the owner; so that if it were of lands in knight-service, or in capite, the owner could not devise the land for a term; but, if he had made a lease for years of it, then it became a chattel in the lessee, and, consequently

⁽ⁿ⁾ *Smith v. Horlock*, 7 Taunt. 128.

^(o) *Jeffery v. Honywood*, 4 Madd. Rep. 398.

^(p) 1 Mod. 100. 2 Lev. 91.

^(q) 4 Mod. 89.

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^(r) 2 P. W. 524.

^(s) 6 Mod. 106. 1 Salk. 236.

^(t) See 5 Burr. 2639. 1 T. R. 414. 7 East, 267.

devisable. So that the words real estate cannot be satisfied without a freehold, at the least, pass; for a chattel real is no real estate. And this is no new question; for *vide* 1 Rol. Ab. 854; Style, 493; that the word estate comprehends both, viz., freehold, and chattels real and personal, (u) especially if the words real and personal be added." And it being objected, "that the word 'estate' is understood, not of the interest which a man has, but of the thing itself; if a man gives, by will, all his estate in such a house, then the interest passes; but if he devises all his estate without ascertaining in what, the thing, and not the interest, shall pass;" Lord Holt replied: "But I do not think so; for the word 'estate' does, in truth, comprehend the thing and interest." (v)

On the authority of *The Countess of Bridgewater v. the Duke of Bolton*, a devisee has been held to take a fee-simple under the word 'estate,' in the devises which follow:—

"All the rest and residue of my real and personal estate whatsoever I give to my dearly beloved wife, Anne Nott." (w)

[*121] "I devise all my land and estate in Upper Catesby, in Northamptonshire, with all their appurtenances, to William Edgeworth, of St. Margaret's, Esq." (x)

"I do by this my will dispose of such worldly estate as it hath pleased God to bestow on me. First, I will that all my debts be paid and discharged; and, out of the remainder of my estate, I give and bequeath unto my wife 300*l*. My mind and will is, that my wife have one moiety of what is left after my debts paid." (y)

"I give and bequeath to Mrs. Marten my estate at Braywick, Berks." (z)

"I give, devise, and bequeath unto my grandson, John Wright, all my estate, lands, &c., known and called by the name of the coal-yard, in the parish of St. Giles, London." (a)

"All the estate which I have I intend to settle in this manner; My estate in Kirby Hall, near Henningham Castle, by Henningham town, which is 135*l*. *per annum*; 128*l*. Exchequer annuity, [and stocks enumerated;] all which I give to my dear brother, Anthony Springet. After his death, my desire is, that it should be disposed of after this manner: to Mr. William Tuffnel, the son of Samuel Tuffnel, Esq., at Langley, in Essex, my estate at Kirby Hall." (b)

"All the rest, residue, and remainder of my goods, chattels, and personal estate, together with my real estate, not hereinbefore devised, I give to A." (c)

"I give to my son, Charles Gale, all that estate I bought of Mead, after the death of my wife." (d)

[*122] "A fee-simple has been held to pass under the word 'estate' in the farther cases cited in the margin. (e)

The word '*estates*,' in the plural, has also been interpreted to signify

(u) See *Doe v. Chapman*, 1 H. Bl. 223.
Ibid., 2. *Barnes v. Patch*, 8 Ves. 804.

(v) 6 Mod. 106. 1 Salk. 236.

(w) *Murry v. Wyse*, 2 Vern. 564. *Tanner v. Wise*, 3 P. W. 295.

(x) *Barry v. Edgeworth*, 2 P. W. 523.

(y) *Beachcroft v. Beachcroft*, 2 Vern. 690.
 See 3 P. W. 297.

(z) *Holdfast v. Marten*, 1 T. R. 411.

(a) *Roe v. Wright*, 7 East, 259.

(b) *Tuffnel v. Page*, 3 Atk. 37.

(c) *Ridout v. Pain*, 3 Atk. 486. 1 Ves.

10.

(d) *Bailie v. Gale*, 2 Ves. 48.

(e) *Smith v. Coffin*, 2 H. Bl. 444. *Harding v. Gardner*, 1 Brod. & B. 72. *Doe v. Gilbert*, 3 Brod. & B. 85.

an interest in land, and has passed a fee-simple in the following devises:—

“I give to A. the income of my four shares in the corn-market, for his natural life; and all the rest of my *estates*, with all monies in stocks, and in B.’s hands, or any other securities, to be divided in equal shares to C., D., and E., share and share alike.”(*f*)

“I devise to my wife, Ellen, all my singular and freehold lands, messuages, and tenements, at Tutbury and Hanbury, or elsewhere; together with all my household goods, cattel, chattels, debts, and all my implements of husbandry, &c., for her natural life; and, after her decease, then all the said estates, goods, &c., to be divided among my sons, A., B., and C., share and share alike.”(*g*)

Technically, the words *real estate* signify freehold or copyhold(*h*) lands, and freehold estates in them. The word ‘*estate*,’ includes all real and personal estate,⁽ⁱ⁾ and, therefore, a term of years; but the words ‘*real estate*,’ are applicable to *freehold* estates alone, and a term of years is not included in them.^(j)

SECTION. VII.

OF THE WORD EFFECTS.

THE popular meaning of the word *effects* has become, [*123] *also, the technical meaning of it. It may signify real property in a will, if it appears the testator has used it in that sense; but, unexplained, the word denotes *personal* property alone.^(k) The unexplained meaning of the word effects in a will first became a question in *Doe v. Dring*. In this case, a person devised in the words: “I, Robert Hick, do declare this to be my last will and testament, by which I do give and bequeath to my wife, Elizabeth, all and singular my effects, of what nature and kind soever, to her own use and enjoyment, during her natural life; and, at her death, to be equally divided between our surviving children.” “No case,” said Lord Ellenborough, “has ever yet come before the Court, touching either a will or any other subject, that I am aware of, where the Court have been called upon to pronounce on the technical meaning of the word effects, denuded, as it is here, of all context; unless, indeed, the words ‘of what nature or kind soever’ can be considered as context and explanatory of it. In *Camfield v. Gilbert*,^(l) and *Doe v. Lainchbury*,^(m) it was taken for granted, that effects in its natural signification imports personal effects; and no case has yet occurred in which that signification, unaided by context, has been extended to real estate. Where a testator has used the general introductory words ‘as to

(*f*) *Fletcher v. Smiton*, 2 T. R. 656.

(*g*) *Roe v. Bacon*, 4 M. & S. 366.

(*h*) 3 Atk. 75. 1 Cox R. 362.

(*i*) 6 Mod. 107. 3 Keb. 49. *Doe v. Chapman*, 1 H. Bl. 223. *Barnes v. Patch*, 3 Ves. 604. See also *Cowp.* 306.

(*j*) 6 Mod. 107. 2 Sim. & St. 337.

(*k*) *Hogan v. Jackson*, *Cowp.* 299. *Doe v. White*, 1 East, 33. *Doe v. Dring*, 2 M. & S. 448. 5 Madd. Rep. 71.

(*l*) 3 East, 516.

(*m*) 11 East, 290.

all my worldly substance,' and the word effects has been coupled with the words 'real and personal,' as in *Hogan v. Jackson*,⁽ⁿ⁾ there it has been considered, that the context gave it a more enlarged and comprehensive sense than it would otherwise have borne, and the word effects has, from the declared intention of the testator, been holden to pass the [*124] *whole interest in the land. And so in *Doe v. White*,^(o) the words 'said effects,' by reference to the antecedent bequest, which comprehended both real and personal, were holden to include the real also but that was so held by the Court, not upon the import of the word effects simply, but as it derived force from the reference that was given to it. On the other hand it may be said, that in *Camfield v. Gilbert*, the Court in holding that the word effects did not extend beyond the personalty, did not decide upon the general import of that word, because there was some context which favoured the narrower construction, for the testatrix excepted out of her effects, her wearing apparel and plate, which was an exception clearly of a personal nature, and also directed that her effects should be divided by her executors. In the present case, therefore, for the first time, the Court is called upon to give it a sense unaided by context. We have a familiar meaning attached to the word effects, in its common use, and as it is used in the statutes relating to bankrupts, where 'estate and effects,' *reddendo singula singulis*, denote, the one, things personal; the other, things real; and I am not aware of any case where it has been holden in its primary and original signification to mean things real." His Lordship and the three other Judges determined, in the particular case, that the word effects, unexplained by any other part of the will to be intended to include real estate, passed the *personal* property alone of the testator.^(p)

SECTION VIII.

OF THE WORD HEREDITAMENTS.

[*125] HEREDITAMENT is a name of land. Land, being inheritable, *is a hereditament.^(q) But the word hereditament does not, besides, mean *interest*^(r) in land. If A., seised in fee, devises land, by the word hereditament, to B., if there are not other words in the will to determine the *interest* devised, B. will be entitled to an estate for *life* only in the land.

In *Denn v. Mellor*, on a devise in the words, "All the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever and wheresoever, I devise to my wife, Sissily Carr;" it was said, by Lord Kenyon: "It has been contended on another ground, that the wife of the devisor took a fee, because the words 'hereditaments' is used in the devise to her; but the cases cited^(s) by the plaintiff's counsel, show,

(n) Cowp. 299.

(o) 1 East, 33.

(p) 2 M. & S. 449.

(q) Co. Litt. 6 a.

(r) 1 Salk. 239. 8 T. R. 503. 1 Bos. & P. 562.

(s) *Hopewell v. Ackland*, Salk. 239. *Canning v. Canning*, Mosel. 240. *Doe v. Richards*, 3 T. R. 356.

that that word is not sufficient to pass a fee, and those cases are not opposed by any one judicial authority.”(f)

SECTION IX.

OF THE WORD APPURTENANCES.

THE word *appurtenances* is, perhaps exclusively, a law term. It is derived from the Latin word, *pertinens*, belonging.(u) It seems, therefore, to be a word of popular use, become a technical term by long and exclusive usage. In popular speech, a garden, for instance, will be said to *belong* to a house. Technically, it will be said to *appertain* to it, or to be an *appurtenant* of it. To belong, in this instance, evidently implies that, of the two subjects of property, “the appurtenant has been made to be inseparably used with the principal.(v) To [*126] belong implies, also, *connexion* or *nearness*.(w) An appurtenant, therefore, seems to be *any* subject of property, in purpose, made to be inseparably used with a principal, and, in place, near to it.

In a case, determined in the reign of Henry VIII., a person made a feoffment of a house, with the appurtenances; and it was held that nothing passed by these words, ‘with the appurtenances,’ but the garden, the curtilage, and close adjoining to the house, and on which the house was built, and no other land; although other land had been occupied with the house.(x) It is added, by Brooke, in his abridgment of this case, “yet in the time of Henry VIII., it was customary to add these words ‘and all lands, tenements, and hereditaments, to the same house belonging, or with the same occupied, let, or demised;’ and, by these words, the land used with the house passed.”(y) It is said in Bettisworth’s case, “when a man makes a feoffment of a messuage *cum pertinentiis*, he departs with nothing thereby but what is parcel of the house; scilicet, the buildings, curtilage, and garden.”(z) In Hearn v. Allen, Richard Keene was seised in fee of a messuage, and of two acres of land in Chipping Norton, and of two acres of meadow in Kingham; and used and occupied the two acres of meadow, being four miles distant from the house, together with his lands and tenements in Chipping Norton. By his will, he devised the house “*cum omnibus et singulis pertinentiis ad inde vel aliquo modo spectantibus*.” It became a question, whether, by this devise of the house, with the appurtenances, the two acres of meadow passed, “being used with it; and it was determined, [*127] they did not pass, “because by the words ‘*cum pertinentiis*,’ land passeth not, but only such things which properly may be pertaining. Otherwise it is, if it had been ‘*cum terris pertinentibus*,’ then that which was used with it would have passed: but by the bare words *cum pertinentiis*, without other circumstances to declare the testator’s intent, they shall never pass.”(a) Buck v. Nurton, was an ejectment to recover 64 acres and a half of land, consisting of a park, meadow-land,

(f) 5 T. R. 568.

(u) See Spelman Gloss. v. *Pertinacia*.

(v) See 2 Co. 31 b. 2 Sir W. Bl. Rep. 1151.

(w) See Spelman Gloss. v. *Pertinens*.

(x) Bro. Abr. tit. Feoffments de terres, 53.

(y) Ibid.

(z) 2 Co. 32.

(a) Cro. Car. 57.

pasture-land, and orchards. Edward Clarke, the testator in this case, devised in the words: "I give and devise to Elizabeth Whalley, all that my capital mansion-house, wherein I now live, and the lands and grounds thereto belonging, and therewith held and enjoyed, with the appurtenances; and also all that my manor or lordship of Chipley, and all other my manors or lordships, messuages, farms, land, tenements, hereditaments, and premises, whereof I have a disposing power; to hold the same to the said Elizabeth Whalley, for and during the term of her natural life; and after her decease, I give and devise my said capital mansion-house, &c., to John Nurton, his heirs and assigns for ever. And it is my express will and desire, and I do hereby direct, that the said John Nurton shall hold and enjoy my said capital mansion-house, with the appurtenances, for the space of one year next after my death." The testator, for many years previous to, and at his death, occupied all the land (the subject of the ejectment) with his capital mansion-house, and the gardens and pleasure-grounds of Chipley. It became a question, whether this land, or any of it, passed to John Nurton, by the clause in the will, which directs that he is to have the mansion-house, with the appurtenances, for a year

[*128] after the testator's death; and all the Court determined, that, *excepting the orchards, it did not pass. By the Chief Justice Eyre, it was said: "I have no doubt upon the case, unless it be with respect to the orchards. Lands will not pass under the word appurtenances taken in its strict technical sense: they will pass, if it appears that a larger sense was intended to be given to it. Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal note to the case in Hobart, (b) there be demonstration plain of an intent to use them in a different sense. In the former part of the will, there is a devise of a house with lands, in terms express, to which is added, 'with the appurtenances,' in order to comprise all which might not fall within the description. Then follows a declaration, that the defendant shall have, for one year, something which was included in the above devise. The testator must be supposed to have understood what he was talking about. If he had intended to have given the whole, the words were before him, and he ought to have used them. Suppose there had been nothing stated to let us into the intention of the testator, but the mere devise to the defendant, we must have examined what was occupied by the testator; and if we had found a house situated in a park which had always been occupied with it, and was, as it were, an integral part of the thing, this might have proved the intention of the testator to pass the whole together. There, if nothing to the contrary had appeared, we might have supposed the testator to have used the word appurtenances in a sense different from its technical sense: but this is not that case. It is true that the premises were occupied for a considerable time together with the house; but, first, the whole of the premises are not necessarily connected; in the next place, there is here solid ground to argue, that the

[*129] testator understood the meaning of the *words employed in the devise, having sometimes used the word lands as a part of the description, and sometimes dropt it. The defendant being the testator's executor, and having been his steward, affords a fair ground of argument. The testator gave him the exclusive enjoyment of the mansion-house, 'with the appurtenances,' for one year only, after having de-

vised the mansion-house and lands also 'with the appurtenances,' to Mrs. E. Whalley, for her life, with remainder to the defendant. Now with what view was this done? Most probably for the convenience of the defendant in the execution of the duty imposed on him. The general intent, therefore, as collected from the devise, and the relation in which the devisees stood to the testator, does not call upon us to go beyond the strict rule in construing the technical word appurtenances." (c) In *Doe v. Martin*, Richard Tonson was seised of a messuage called Passars, with a parcel of land thereto belonging, being copyhold of inheritance, under the manor of Fulham, in Middlesex, in his own occupation. Matthew Ramsey was seised of several other copyhold messuages and gardens, adjoining in part to Passars; and by indenture of 10th July, 1762, demised to Tonson a messuage and two acres of garden, adjoining to Passars, for 21 years. Ramsey devised all his copyhold estates to his wife, Juliana Ramsey, for life. On 18th October, 1762, Juliana Ramsey, the widow, demised to Tonson several cottages, part of the said copyhold estates, for 99 years, if she so long lived. Tonson, on taking the lease of the 10th July, 1762, laid the greater part of the garden thereby demised into his own premises, called Passars, and let the rest, together with the messuage, to Elizabeth Bibby. He also pulled down the cottages *demised by Juliana Ramsey, and laid the scite of them into his own court-yard. In [*130] 1767, Tonson devised to Catherine Whitburn, and her heirs, "all that his copyhold messuage, with all out-houses, gardens, and appurtenances to the same belonging, situate and being at Fulham, in the county of Middlesex, and then in his possession." "What," inquired the counsel for the plaintiff "is devised? 1. Not the premises let to Bibby, for the testator devises only one messuage, and restricts his devise to what was then in his possession. 2. Not the scite of the four messuages, for that cannot pass as appurtenant to an estate held by another title, although it had been used with it; *Yates v. Clincard*, Cro. Eliz., 704; *Archer v. Bennett*, 1 Lev. 131." "The consideration," said the Chief Justice De Grey, "is, what the testator *meant* to devise; for that is the rule of construing a will. The case in Cro. Eliz. is only that a copyhold cannot be appurtenant to a freehold. And here both are of a copyhold tenure, although held for a different term. And that in *Levinz* says only, that occupying one thing together with another shall not make it legally appurtenant. That also is the case of a deed, and not of a will. And even there it was held, that, if necessary for the use of the principal, the thing so occupied shall become appurtenant. And sure a court-yard is necessary for the use of a house. The testator's plain meaning was, to unite, as far as he could, the scite of the cottages to his house, and devise all that he so personally occupied; and, therefore, he meant to devise the scite of the four cottages as appurtenant to his house, but not the messuage and lands which he had demised to Mrs. Bibby." (d) The point determined in this case seems to be, that land near to, and appropriated to *inseparable use with a house, will, if not against [*131] the intention, pass under the word appurtenances in a will, although the land and the house are held by different leases.

Technically, the word appurtenant seems to be a term of various application. The meaning of it, in a particular case, appears to be deter-

(c) 1 Bos. & P. 53.

(d) 2 Sir W. Bl. Rep. 1148.

mined by the description of principal to which it belongs. *Buck v. Nurton* does not decide that a park may not be an appurtenant of the capital mansion-house of a manor; it only decides, that in the particular case, by the intention, it was not. It seems, indeed, to be distinctly stated by the Chief Justice, that, if not against the intention, the word appurtenant will, technically, include a park, on the devise of a mansion-house situated in a park, the park being occupied with it. On the devise of a house with the appurtenances, the word appurtenances appears technically to include outbuildings of any kind, a yard, curtilage,^(e) garden, and orchard;^(f) and it may be added, perhaps, any description of property near to the house, and made to be inseparably used with it.

The meaning of the word appurtenances, like every other word in a will, depends, indisputably, in all cases, on the intention. The term has, it is to be admitted, a technical signification; but, clearly, it may be used in an untechnical sense; and if a testator explains his own meaning of it, on the universal principle of intention, that meaning will determine the effect of the devise. This is, besides, a plain inference from the words in *Hearn v. Allen*: "By the bare words 'with the appurtenances,' without other circumstances to declare the testator's intent, lands shall [*132] never pass."^(g) And in *Buck v. Nurton*, *the Chief Justice stated in terms: "Lands will not pass under the word appurtenances, taken in its strict technical sense; they will pass, if it appears that a larger sense was intended to be given to it."^(h) In *Blackburn v. Edgley*, it was objected on the particular devise, "that although the house at Clapham passed to the mother for her life, if she would live there, yet only the house and curtilage would pass, and not the land employed for the producing hay and corn, &c." But, by the Court: "It is true that by the grant or devise of a house, *with the appurtenances*, only the garden and orchard will pass with the house; but the devise of a house, *with the lands appertaining*, will pass land. Now the intention of the testator was, that after his death, during the life of his kinswoman, Ann Edgley, every thing should be carried on and transacted as it was in his life-time, and this to such a nicety, as that the same number of servants, and even of coach-horses, was to be employed, the same hospitality observed, the same horses used in ploughing the lands; which could not be, unless the lands were to continue as before to be enjoyed with the house. Wherefore, as it seems to have been his intention not to part them, let those lands which were before constantly enjoyed with the house, and the profits whereof were applied to the maintenance of the house, continue to be so enjoyed."⁽ⁱ⁾

If a person devises simply in the words, I devise my messuage to A.; the appurtenances of it, although not named, will impliedly pass by the devise. A person was seised of a messuage, to which a garden and curtilage belonged, joined together and enclosed with a wall, and there was no way to the garden but through the messuage. He devised the mes-
[*133] suage, but did not mention the garden *or curtilage, nor say with the appurtenances. It became a question if the

(e) See *Spelman, Gloss. v. Curtilagium*.

(f) 1 P. W. 603.

(g) Cro. Car. 58.

(h) 1 Bos. & P. 57.

(i) 1 P. W. 600, 602. See also *Ongley v. Chambers*, 1 Bingh. 483.

garden and curtilage passed; and it was adjudged that they did pass; for it was agreed clearly, that a curtilage is a parcel of a house; and, like a stable or dove-house, will pass in the case of a feoffment without saying with the appurtenances. The Court doubted of the garden, because it is but a place of pleasure; but it was afterwards resolved that the garden also passed, for it is as well for necessity as pleasure.^(j) There appears formerly to have been a distinction, in respect to appurtenances, between the words messuage and house; the latter being considered not to include all the appurtenances implied in the word messuage.^(k) The modern case, however, of *Doe v. Collins*, seems to have exploded the distinction. It is there held, that on a devise simply of a house, the appurtenances of it impliedly pass with it.^(l) "The distinction between house and messuage," said Mr. Justice Ashhurst, "seems too subtle to be relied on at this time; for I think that whatever would pass by the one, would equally pass by the other."^(m)

SECTION X.

OF THE DESCRIPTION OF THE LAND DEVISED.

If land devised is in part correctly, and in part incorrectly described, it should seem the exposition of the will is made simply on the correct description, and the misdescription remains ineffective.

A person devised in the words: "I devise the house or tenement wherein William Nicholls dwelleth, called the *White Swan, [*134] in Old Street, to Henry Gallant, my daughter's son, for ever." William Nicholls occupied only three upper rooms of the house, and other persons occupied the remainder; yet it was determined that the whole house passed by the devise.^(o) Peter Blague, being seised in fee of two houses in Andover, the one a corner-house, in the tenancy of Binson and Nott, the other adjoining in the tenancy of Hitchcock, devised his house "called the corner-house, in Andover, in the tenure of Binson and Hitchcock," to J. S., in fee. On the misdescription in this will it was determined, that the corner-house passed by the devise, but not the house adjoining in the tenancy of Hitchcock; "for although the corner-house was not in the tenure of Hitchcock, but a misprision, yet the devise is good, for it is sufficiently ascertained before, namely, the corner-house in Andover. And the addition, in the tenure of Hitchcock, although it be not in his tenure, and is a mistake, yet it is but surplusage; and, although false, shall not vitiate the devise, because the devise was of a thing certain at the first, and shall be expounded according as the intent of the parties is apparent."^(p) A person devised as follows: "I give to Katherine, my wife, all the profits of my houses and lands, lying and being in the parish of Billing and L., at a certain street there, called Broke-street." The devise was held to be good, although

^(j) *Carden v. Tuck*, Cro. Eliz. 89.

^(k) *Harg. Co. Litt.* 5 b. (1). 2 T. R. 500.

^(l) 2 T. R. 498.

^(m) *Ibid*, 502.

^(o) *Chamberlaine v. Turner*, Cro. Car. 129.

^(p) *Blague v. Gold*, Cro. Car. 447, 473.

there was no village or hamlet in the county called Billing. The land supposed to be devised lay in Byrling-street.^(g) On a devise in the words, "I devise to J. S. all those my lands in Bramstead, in the county of Surrey, in the possession of John Ashley;" it appeared the testator had [*135] not any lands in Surrey, but he had lands in Bramstead, in Hampshire, in the possession of John Ashley. And in an ejectment brought by the heir of the testator, for these lands in Hampshire, against the devisee, it was ruled by Holt, Chief Justice, that the lands in Hampshire would pass by this devise.^(r) A person devised: "I give and devise to my dear wife my farm at Bovington in the tenure of John Smith." A part of the farm consisted of six acres of woodland, which the testator kept in his own hands, and were not in the possession of John Smith. It was held that the whole farm, including the woodland, passed by the devise. 'It is manifestly intended,' said Lord Mansfield, 'that the whole farm should pass by this will; and the testator never thought of any restriction of his devise, but meant these words, 'in the tenure of J. S.' only as an additional and fuller description of a thing sufficiently ascertained before.'^(s) Thomas Bromley devised in the words: "I devise to J. Brittain and J. Marshall, their heirs and assigns, all that my messuage, dwelling-house, or tenement, with all lands, hereditaments, and appurtenances thereto belonging, situate and being in Blythbury, in the parish of Mavesyn Ridware, in the county of Stafford, now in the occupation of Thomas Willett, (except one meadow, called Floodgate Meadow, containing by estimation two acres, or thereabouts,) in trust," &c. Mavesyn Ridware is a parish containing three distinct townships, viz., Blythbury, Hill Ridware, and Mavesyn Ridware. At the time when the testator made his will, and also at the time of his death, his property in Blythbury consisted of a messuage and about 19 acres of land. The messuage, and rather more than two acres of land, were in the occupation of Thomas Willett. The remainder of the property in Blythbury was occupied partly by the testator himself, and [*136] partly by other persons. Thomas Willett never occupied the Floodgate Meadow. The devise was held not to be confined to the messuage and land in the occupation of Thomas Willett, but extended to all the lands in Blythbury, excepting the Floodgate Meadow. "I think," said Mr. Justice Bayley, "it was the testator's intention, by the devise of his messuage, with all lands, hereditaments, and appurtenances thereto belonging, situate in Blythbury, to give all that he had there under one title, excepting the Floodgate Meadow, which he particularly excepted; and then the question is, whether the words 'now in the occupation of Thomas Willett,' will restrain the other description. But if they were so construed, the exception would be altogether nugatory; and, therefore, that exception shews that he meant to pass something more than what was in Thomas Willett's occupation."^(t) Goodtitle v. Southern, was an ejectment for two closes of land in the parish of Darley, in the county of Derby. It arose on the following devise, in the will of Richard Southern: "I give and devise all that my farm, lands, and hereditaments, called Trogues-farm, situate

(g) *Pacy v. Knollis*, 1 Brownl. & Gold. 131.

(r) *Hastead v. Searle*, 1 Ld. Raym. 728.

(s) *Goodtitle v. Paul*, 2 Burr. 1089.

(t) *Marshall v. Hopkins*, 15 East, 309.

within the parish of Darley, in the county of Derby, now in the occupation of A. Clay, to my brother John Southern, his heirs and assigns, for ever." The two closes in question were proved to be a part of Trogues-farm. They were not, however, in the occupation of A. Clay, but of one Marsden. Yet they were held to be included in the devise. By Lord Ellenborough: "The testator was mistaken as to the person in whose occupation the two closes were; but the devise is sufficiently comprehensive. It is clear that he meant to pass all which was called Trogues-farm, which is a plain and certain description; and the defective description of the occupation will not alter the devise."^(u) Doe v. the Earl of Jersey *was an ejectment to recover lands in the county of Brecon. It arose on the will of a testatrix, who [*137] devised as follows: "I devise all that my Briton Ferry estate, with all the manors, advowsons, messuages, buildings, lands, tenements, and hereditaments thereto belonging, or of which the same consists, with the appurtenances, unto Thomas, Earl of Clarendon, for his life; and after his decease, to the second son of George Bussy Villiers, Earl of Jersey, and his heirs. Also, I give and devise my Penlline Castle estate, which, as well as my Briton Ferry estate, is situate, lying, and being in the county of Glamorgan, in the principality of Wales, with all the manors, &c., thereto belonging, unto Mrs. Emily Gwinett, and her heirs, for ever." It appeared by evidence, that Briton Ferry is a parish in Glamorganshire, and that the lands, called by the testatrix the Briton Ferry estate, lay, part, comprising the whole parish of Briton Ferry, in Glamorganshire, and part in the county of Brecon. The ejectment was brought on the ground that the first devise of 'all my Briton Ferry estate, with all the manors,' &c., was qualified and explained by the devise of the Penlline Castle estate, and the recital, that that and the Briton Ferry estate were situate in the county of Glamorgan. But it was determined, that the lands in the county of Brecon, proved to be a part of the estate called by the testatrix the Briton Ferry estate, passed by the devise, as well as the other part of the estate which lay in the county of Glamorgan. "Here," said Lord Ellenborough, "there is a clear devise, by name, of the Briton Ferry estate, and no case has been cited to shew that it is not sufficient to describe an estate by its aggregate name; and, therefore, I have no doubt that the whole of the Briton Ferry estate passed by this description in the will." And Mr. Justice Bayley: "I have always taken the rule to be, that where *a [*138] testatrix has sufficiently described the property intended to be devised, so as to leave no fair ground for doubt as to the property, that then the addition of another circumstance, with a view to identify it, will not limit and restrain the first devise, unless it clearly appears that the testatrix so intended it. That rule will be found in Dowtie's case,^(v) and in Doe v. Greathed.^(w) Now, if that rule be applied to the circumstances of this case, it will stand thus: The testatrix has an estate, partly situate in the county of Glamorgan, and partly in Brecon, which, for many years before her will, had been known by the name of the Briton Ferry estate, part of it being situate in the parish of Briton Ferry, in which parish the testatrix had no manor, and only one advowson. Then she devises 'all that my Briton Ferry estate, with all the manors, ad-

^(u) 1 M. & S. 299.^(v) 3 Co. 10 a.^(w) 8 East, 103.

vowsons, messuages, &c., thereto belonging, or of which the same consists.' It is, therefore, clear, that this devise cannot be confined to that part of the Briton Ferry estate situate within the parish of Briton Ferry; for the testatrix speaks of manors and advowsons, and in that part of the estate there was no manor, and but one advowson: the devise, therefore, must extend to the whole of the Briton Ferry estate. Then there is in the will a subsequent devise of the Penlline Castle estate, in which there is an addition to the description of the Briton Ferry estate, which is applicable only to part of it, and which is, quoad the residue, a false description; and the question then arises, whether this will limit or narrow the prior devise. Now there does not appear on the face of the will any such intention on the part of the testatrix; and, if so, then provided the words of the former devise admit of no reasonable doubt, the addition of these latter words will not vitiate it. Now, do the words of

[*139] the former devise admit of any fair doubt? *The words 'all that my estate' must mean an entirety, and there is no entire estate called the Briton Ferry estate, which is confined to the county of Glamorgan. The words, therefore, of the first devise being clear are not to be confined, by the subsequent description in the will, to that part of the estate which is within the county of Glamorgan." (x) In *Banks v. Denshire*, a testator devised: "I give all and every my freehold and copyhold messuages, lands, tenements, and hereditaments (having surrendered the copyhold parts thereof to the use of my will) situate, lying, and being in L., to [testator's daughter] and the heirs of her body; and the said copyhold part thereof shall be subject to the payment of 400*l.* mortgage, which is on part thereof. And as well the said freehold as the said copyhold estate shall be subject to an annuity of 50*l.* to [testator's son and heir, the defendant] for life." The testator had two copyhold estates in L.; one of which he had surrendered to the use of his will, the other not. On a bill filed by the devisee against the heir at law of the testator, the question was, whether the defect of surrender of part of the copyhold should be supplied against the son and heir of the testator. For the heir, it was argued that it should not from the intent of the testator to devise nothing but what was surrendered.—"I think," said Lord Hardwicke, "there are words sufficient to take in this copyhold estate; the description being as large as possible to take in the whole; and what is to confine it is in a parenthesis, and in nature of a recital; therefore, not like words containing a description. This, therefore, differs from the case cited [*Gascoigne v. Barker*, 3 Atk. 8,] which was determined by me with great reluctance; the relative pronoun 'which' there making it restrictive. Suppose the testator had begun with the recital, that 'whereas I have surrendered,' &c., in which he had been

[*140] mistaken; yet the words of the grant should *have had their full effect. But the latter words sufficiently shew his intent to give the whole; describing it as part of what he before devised, and shewing he meant to give more than the part subject to the mortgage; and he had no other copyhold except that in question; which therefore comes within the description, and the defect of surrender must be made good." (y) In *Rumbold v. Rumbold*, Sir Thomas Rumbold devised in

(x) 1 Barn. & A. 550.

(y) 1 Bell's Ves. sen., 63. *Banks v. Denshaw*, 3 Atk. 585.

the words: "I devise all other my estates, as well copyhold as freehold (the copyhold part thereof having been previously surrendered to the use of my will,) whereof I am seised in fee-simple, to" [trustees, on several trusts in favour of testator's wife and children: the only trust for his eldest son and heir being an annuity of 300*l.* for life, remainder to his wife and children.] The testator was seised in fee of copyhold lands holden of the manor of Sacomb, according to the custom of the manor, and had no other copyhold estate. He had not surrendered his copyhold estate to the use of his will, and it appeared he had never been admitted. On a bill filed against the heir at law of the testator, who had procured himself to be admitted to the copyhold estate, the statement in the will, that the copyholds had been surrendered, was held to be a mistake, and the heir was decreed to elect. Lord Loughborough: "The question is only whether Sir Thomas Rumbold meant to devise this estate. It is not a question whether the Court is to supply a surrender. The interpretation for the heir cannot possibly be consistent with the words: what is contended for him is, that the testator had reference to a future surrender. The words negative the conclusion that he meant to surrender. They intimate distinctly, that he supposed himself to have previously surrendered. That he had not done. It is nothing more than a mistaken description." (z)

*THE cases, which have been mentioned, (a) appear to establish, that if in a devise, the land is in part correctly, and [*141] in part incorrectly described, the misdescription is ineffective; but it should seem, if land is devised by a description which is not incorrect, one part of the description may narrow the extent of the other.

Doe v. Bell was an ejectment to recover certain copyhold premises, called Reads and Greens, in the parish of Gillingham. E. Read being seised of the two copyholds, called Reads and Greens, surrendered them to his son, W. Read, in fee, who was accordingly admitted. W. Read, being seised of these two copyholds, and also of two other copyholds in Gillingham, called Maddocks and Langham, which two last were devised to him by his father, E. Read, and all of which he had previously surrendered to the use of his will; and being also seised of a freehold, and possessed of a leasehold estate at Gillingham, both of which last were also devised to him by his father; devised:— "As to, for, and concerning all my freehold, copyhold, and leasehold estates, situate in the parish of Gillingham, and which I became entitled to on the decease of my father, having previously surrendered all my said copyhold messuages, lands, &c., to the use of my will, I give and devise the same to," &c. On this will it was determined, that the two copyholds called Reads and Greens, which had been surrendered to the testator in his father's life-time, did not pass by the devise. By Grose, J.:—"The devisor died seised of the copyhold estates which had been surrendered to him in his father's life-time, and of other copyholds to which he became entitled on his father's death; and in devising the estates which he meant to give to the defendants, he described them as the estates 'to which he became entitled on the death of his father;' but that

(z) 3 Ves. 65.

(a) See also *Windham v. Windham*, 3 Dyer, 376 b; 3 Co. 10; and *Hob.* 171.

[*142] "devise cannot include the other estates, which he had in his own right in his father's life-time." (b) *Doe v. Parkin* was an ejectment to recover, amongst other premises in Thurgoland, in the county of York, the Tontine Inn, and nine acres of land. It was occasioned by the following devise:—"I devise all my messuages, tenements, lands, grounds, hereditaments, and premises, situate at or in the township of Thurgoland, in the parish of Silkstone, and county of York, and now in my own occupation, with the appurtenances, to" &c. The testator, at the time of making his will, was seised in fee of a messuage and five acres of land, called Spring House, in his own occupation; and the testator was also, at the time of making his will, seised in fee of the inn called the Tontine, and nine acres of land, but which inn and nine acres of land, at the time of making his will, were not in his own occupation. The Court of Common Pleas determined that the words in the will, 'and now in my own occupation,' were clearly restrictive. (c) *Gascoigne v. Barker* is also a case in which a description of land in a devise has been held to be narrowed by words of farther description. The devise in this case was in the following words:—"I give to my son Henry all my lands, tenements, and hereditaments, in possession and reversion, freehold and copyhold, in the parish of Chiswicke, or elsewhere, in the county of Middlesex (which copyhold lands I have surrendered to the use of my will,) to him and his heirs." It appeared the testator at the time he made his will was seised of a copyhold house, which was an inn, called the King of Bohemia's Head, at Turnham Green. Three parts of the house were in one manor and one in another manor. Before the will was made, the testator had surrendered to the [*143] use of his will only in the manor under which the three parts were *held. (d) By Lord Hardwicke: "The question is, whether the words in the parenthesis are to be taken as restrictive of the first words of the devise; and I can take them no otherwise. This is the case of lands devised by general words: if, instead of this, the testator had said, I give my messuages with the appurtenances, called the King of Bohemia's Head, that would have been a different case, and I should have thought the subsequent words a mistake only in the description. But, when a man does not make a certain definitive description, it is very difficult for Courts of justice not to construe the subsequent restrictive words as explanatory of the former. An observation has been made on its [the mention of the surrender] being in a parenthesis; that the sentence, for this reason, is independent and complete without it, and therefore this may be rejected as superfluous. It is true, with regard to the niceties of grammar, the observation may be right in some instances: but, in legal cases, a parenthesis is not to be rejected. Besides, there are many instances in the common kind of writing, where commas only are used instead of a parenthesis; therefore this may be laid out of the case. But, what makes it still stronger, there is a plain reason here for a parenthesis: because, in the former part of the devise, the testator had coupled the words copyhold and freehold together, and therefore he was under a necessity of throwing it into a parenthesis, with the repetition of the word copyhold. The great objection, and which has some weight, is,

(b) 8 T. R. 579.
 (c) 5 Taunt. 321.

(d) See 1 Ves. 63.

that there is part of the same inn, or house, which has been surrendered: and if the testator had described it by name, I should have been of opinion the whole would have passed, although part only had been surrendered. But it appears, by the surrenders *themselves which were made at different times, that part of the inn was not [*144] bought till some time after the first surrender; and therefore this fact clears up and explains the intention of the testator. So that the Court must make so many stretches here, in order to disinherit the customary heir, that it is much better to let the words have their plain and obvious meaning, although the defendants are younger children, and claim the lands as a provision.”(e) It is observable, so closely do the words (which state the surrender to have been made) used in the will in *Gascoigne v. Barker* resemble the words of the testator in *Banks v. Denshire*, that the two cases might appear distinguishable only in their opposite results. In *Banks v. Denshire*, the words used are, ‘having surrendered the copyhold part thereof to the use of my will:’ in *Gascoigne v. Barker*, ‘which copyhold lands I have surrendered to the use of my will;’ and, in both cases, the words are in a parenthesis. But *Gascoigne v. Barker* seems to have been determined on the opinion, that, in the will in that case, there was not a mistake in the description. It therefore, in substance, appears not to oppose *Banks v. Denshire*, and the other authorities, from which it has been collected, that if in a devise, land is in part correctly, and in part incorrectly described, the exposition of the will is made simply on the correct description, and the misdescription remains ineffective.

On a devise in the words, I devise my estate of A., a local name; or, I devise my estate at A.; it appears the devise is interpreted to be of land strictly at the place *named, and will not pass other [*145] lands out of A., although they are near to the same estate, and are a part of it. It farther appears, that collateral evidence is inadmissible to prove that, in the mind of the testator, the lands out of A. were a part of the estate of the name, and that he intended to include them in the devise.

Doe v. Oxenden was an ejectment by the heir at law of Sir John Chichester, bart., who died seised in fee as well of the premises in question, which composed his maternal estate, as of other property which he derived from his father. The premises claimed consisted of the manors of Ashton, George Teign, and Stowford; the tithes impropriate of the parish of Nether Ex; and two estates called Great and Little Bowley, in the parish of Cadbury, in the county of Devon. The manor of Ashton is situate in the parish of Ashton, with the exception of one insulated estate, parcel thereof, which lies in the parish of Exminster, adjoining to the parish of Ashton. The manor of George Teign is situate in Ashton parish. Of the manor of Stowford, one part lies in the parish of Crediton, and the other in the parish of Sandford; the manor itself being distant from the parish of Ashton about 12 or 13 miles. The parish of Nether Ex is also about 11 or 12 miles, and the parish of Cadbury 15 miles, distant from the parish of Ashton. With the premises aforesaid, are comprised, besides the manor of Ashton, the Barton of Ashton and lands lying within the parish of

(e) 3 Atk. 8.

Ashton. Sir John Chichester devised in the terms following:—"I give my estate of Ashton, in the county of Devon, to George Chichester Oxenden, second son of Sir Henry Oxenden, bart., of Broom, in the county of Kent." On the trial at the assizes, a variety of collateral evidence was offered and admitted to prove, that by the words "my estate [*146] of Ashton," the testator did not mean *to confine the devise merely to the lands in the parish of Ashton, but intended to dispose of the whole of his maternal estate before specified. The point of the admissibility of the evidence came afterwards before the Court of Common Pleas, where Sir James Mansfield, who delivered the judgment of the Court, after recapitulating the case, and adverting to the evidence, added; "If this evidence ought not to be received, the consequence will be, that so much of the property only will pass, as is not affected by the evidence. I have doubted much upon it. On the whole, I rather think we should go further in receiving this evidence, than any case has yet gone. There is an extreme jealousy in receiving evidence to explain written instruments. Many cases have been cited. In general, they are well known. The last and strongest was *Doe v. Brown*.^(f) There it was impossible to doubt what the testator meant. In this case, my own judgment only is, if the evidence were admitted, that the testator meant to devise the whole of his maternal estate to his maternal relations, and not only the land locally situated at Ashton. But to decide in favour of this evidence would be going further than any Court has yet gone. I need not particularize the cases; of devises where there were two persons of the same name; where the name, by which property was devised, applied equally to two estates. Such was the case in *Peere Williams*, of a devise to Gertrude Yardley, by the name of Catherine Earnly, where there was no such person as Catherine Earnly; the case in *Ambler*, of legacies to John and Benedict, sons of John Sweet; he had two sons, the name of one was Benedict, but the name of one was James; the evidence was received. It is not expressly said in any of these cases, that it was necessary to receive the evidence, in order to give [*147] *effect to the will, which would not operate without such evidence. But although this is not said, yet the rule seems to hold. It will be found that the will would have had no operation unless the evidence had been received. Here, without the evidence, the will has an effective operation; every thing will pass under it that is in the manor or parish, or what he would naturally call his Ashton estate. This will be an effective operation; and this being so, the case herein differs from all the others; because in them the evidence was admitted to explain that, which, without such an explanation, could have had no operation. It is safer not to go beyond this line. Therefore only those premises pass which are in the manor or parish of Ashton; for all but them the plaintiff has a right to recover."^(g) This case has been followed in *Doe v. Greening*, in which Thomas Wylde, being seised in fee in remainder, expectant on the several deaths of three persons, of one undivided moiety of a mansion-house, farm, and lands, with the appurtenants, situate at Coscomb; and also of one undivided moiety of the manor of Farmcott; and of the messuages, farms, and lands, with the appurtenants, situate within the said manor, in the parish of Gaiting Power,

(f) 11 East, 441. 1

(g) 3 Taunt. 147. 4 Dow. P. C. 65.



in the county of Gloucester, by his will devised to his son, R. B. Wylde Browne, "all the estate and interest whatsoever which I have or can claim, either in possession or reversion, of or in any lands, tenements, and hereditaments, at Coscomb, in the county of Gloucester; to hold to my son, his heirs and assigns for ever." After the testator's death, and the death of the last of the three lives, R. B. W. Browne entered into possession of a moiety of the mansion-house and lands at Coscomb, and of the manor of Farmcott, and the farms and land within that manor; and afterwards died intestate, leaving a son, the lessor of the plaintiff, who brought this ejectment for the moiety of the [*148] manor of Farmcott, &c. And in order to shew that this moiety, &c., passed under the devise, the plaintiff offered to give in evidence, that the estate at Coscomb formerly belonged to one Tracy, who devised it to his grandson in tail, with a direction that his trustees should lay out the rents and profits, during the minority of his grandson, in the purchase of land near to Coscomb, and settle the same; in pursuance of which, the trustees, in 1749, purchased the manor of Farmcott; and the two estates had ever since been united and enjoyed as one estate. The learned Judge on the trial rejected the evidence, being of opinion, that as it appeared the testator had lands at Coscomb, which was sufficient to satisfy the devise, evidence was not admissible to shew, that he intended to devise other lands not at Coscomb. On a motion for a new trial upon the rejection of this evidence, a difference was proposed, on the part of the plaintiff, between this case and *Doe v. Oxenden*; that the evidence in the present case related to property near to Coscomb, whereas in *Doe v. Oxenden*, the evidence related to estates, most of which were at a considerable distance from Ashton. Lord Ellenborough inquired of the counsel, the present learned Chief Justice of the King's Bench, if he had any authorities, to which he answered, that he had searched in vain; whereupon his Lordship observed, "that the word 'of' was certainly a word of more general description than 'at;' and, without some authority, the Court could not permit it to be agitated that a word, properly denoting local description, and not general description, could have a different sense given to it by the admission of evidence." Dampier, J., added, that "nothing could be plainer than what the testator, in *Doe v. Oxenden*, meant by his estate of Ashton, if the evidence had been admissible, for he called all his maternal property his Ashton [*149] estate." (g)

Doe v. Lyford, (h) is a farther case to the same purpose. (i)

There is a distinction between a devise in the words, 'I devise my estate of or at A.,' and a devise in the words, 'I devise my A. estate.' If a person devises an estate by a name, which is not, besides, the name of the place where the estate lies, collateral evidence is admissible to prove of what lands the estate consists. (j) So, on a devise of the A. estate, although A. may be a local name, as the name of a parish, it may also be accepted to mean the name of the estate, and collateral evidence is admissible to prove, that lands, which are not in the parish of A., are

(g) 3 M. & S. 171.

(h) 4 M. & S. 550.

(i) See also *Whitbread v. May*, 2 Bos. & P. 593.

(j) *Heigham's Case*, Godb. 16. *Goodtitle v. Southern*, 1 M. & S. 299.

a part of the estate A., and, if proved to be a part of it, they will pass under the devise of the A. estate. In *Doe v. the Earl of Jersey*, a testatrix devised in the words, "I devise all that my Briton Ferry estate, with all the manors, advowsons, messuages, buildings, lands, tenements, and hereditaments thereto belonging, or of which the same consists, with the appurtenances." Briton Ferry is a parish in the county of Glamorgan, and part of the estate lay in the parish; and yet it was held, that not only lands which were not in the parish, but lands which were a part of the estate, although in another county, passed under the devise.^(k) But, it should seem, had the devise, in that case, been in the words, I devise my Briton Ferry estate, in the county of Glamorgan; on the principle of *Doe v. Oxenden*, the part of the estate out of the county would not have passed by the devise, which would then have been confined to the county in which the testatrix described the estate to be.^(l)

[*150]

*SECTION XI.

OF DEVISES BY TENANTS FOR YEARS.

A TERM of years is personal property. Personal property acquired after the publication of a will, may, and, *prima facie*, will pass under a general bequest of personalty in it. *Prima facie* it is presumed to be intended to pass. If, then, a person makes a general bequest of personalty, but, at the time he makes his will, is not possessed of land for a term of years, but afterwards takes a lease for years, and dies possessed of it, the land held under the lease, although taken after the publication of the will, will pass under the general bequest in it. It appears, also, if a tenant for years bequeaths personal property generally, and, after the will is made, the lease expires and he renews it; the land held under the new lease for years will pass under the general bequest of the personalty in the will published before the new lease was taken.

In *Wind v. Jekyl*, it is said by the Lord Chancellor Macclesfield: "A devise of a lease for years differs from a devise of a freehold or fee-simple. For instance, one cannot devise fee-simple land, which he has not at the time of making the will; but leases [for years] or personal estate, although they were not the testator's at the time when he made his will, yet, if they be his at the time of his death, they shall pass by the will. Therefore, if one devises all his real and personal estate, and afterwards acquires more of each kind, the real estate acquired afterwards shall not pass; *secus* as to the personal estate."^(m) In *Stirling v. Lydiard*, there was a devise in the following words: "As to all and [*151] singular my leasehold estate, goods, *chattels, and personal estate whatsoever, I give to my daughter Johanna; and, if she dies without issue living, then," &c. In the residuary clause, [which bequeathed the residue to testator's daughter] he repeated the words

(k) 1 Barn. & A. 550.

(l) *Ibid*, 557.

(m) 1 P. W. 575; see *ibid*, 424; also 1

Salk. 237, 238; and *Adean v. Tompler*, cited 3 P. W. 168.

"all and singular," &c. After making the will, the testator renewed a lease with the Dean and Chapter of Windsor. Johanna died without issue, and her husband, as administrator and representative of his wife, brought his bill to have the renewed lease; insisting that the renewal by the testator, after making the will, was a revocation, and that, consequently, he, in the right of his wife, was entitled to it. Lord Hardwicke: "There is no doubt but the leasehold estate passed by the will. The plaintiff goes upon a mistake, that this is a *specific* legacy. It is nothing like it, for it is only an enumeration of the several particulars of his personal estate, but yet is a *general* devise of the whole. Suppose the testator had purchased a new lease, would not that have passed? Why, then, should not a new term in a lease equally pass? If I was to construe this a revocation, I do not know but, if a man was to give all his Bank, East India, and South Sea stock, and should afterwards turn it into money, it might as well be insisted this was a revocation." (n)

It is in the power of a person prospectively to devise a lease for years, which he may be possessed of at the time of his death; (o) but if a tenant for years devises in the words, I devise my lease to A.; and the lease is determined before his death, the devise ceases with the lease; and if the testator takes a new lease for years, such renewed lease will not pass under the will, unless it is republished, (p) *or there are other words in the will which prove the devise in it to be prospective. These points appear from the case of Sir Thomas Abney v. Miller, in which a testator devised in the words, "I devise all my college leases which I now hold of Magdalen College, to my mother, Mrs. Elizabeth Burton." (q) [In trust for sale, and to divide the money.] Several years after making the will, the testator surrendered the college leases devised by it, and accepted two new leases of the same premises, and paid large sums of money by way of fine. By Lord Hardwicke: "I will consider the question, in the first place, as if it had been an express legacy, or gift of the term, to the three *cestuis que trust*. For, suppose he had said, 'I give and bequeath both the leases to my mother, &c., equally, share and share alike,' and afterwards the testator renewed the leases; what would have been the effect in point of law? There is no doubt but, in this case, it would have been an ademption or revocation; and even if the executrix had assented, the legatees could never have recovered the term upon the renewal by an ejectment; for the thing itself is annihilated and gone. It is not in this case a devise of the land, but a devise of the lease, which I hold, &c., of Magdalen College, &c. Just as if he had said, I devise the term, and that term is surrendered and gone. Where a testator expresses himself in the present tense, it must relate to what is in being at the time of making the will, and can mean only the first lease, and the term to come in it. The defendant's counsel have compared it to a gift of a ship, or a house which is rebuilt, after the making of the will; but they are different, for this reason, because a ship or house is the same *corpus*; and, in the present case, it is an absolute new term, and the old one is gone. But then some *stress [*153] has been laid on its being the common course and method

(n) 3 Atk. 199. See also 2 Atk. 599.

(o) 6 Madd. Rep. 84.

(p) Coppin v. Farnyough, 2 Bro. C. C. 291.

(q) See 3 Atk. 176.

of renewal in bishops' and college leases. This Court does regard the custom of renewal in some cases, because if such an estate is given upon trust, and the estate so given is renewed after the death of the donor, yet the Court considers it as governed by the old trusts, with respect to persons claiming under the testator; and the executor renewing would have been bound by the trust: but this will not extend so far as to bind the testator himself, in his life-time, under any trust that he may have created. The same as to freeholds; for if there is an estate for three lives in the testator, and he has devised it; yet if he surrenders these three lives, [this estate,] and takes a new lease, this is admitted on all hands to be a revocation. Therefore, I am of opinion, if it had been an express bequest, it would have been a revocation in law. At the same time I agree, if a man had devised a lease, together with a right of renewal, and had done nothing in it himself, that then the expiration of the old term would not have barred the legatee, because the devise carried the right of renewal, as well as the lease itself. As I am clear of opinion this would have been an ademption in law, so must it be here." (r)

In *Carte v. Carte*, the beneficial interest in a lease for years was devised, and Lord Hardwicke held there were sufficient additional words in the will to extend the devise to the interest in a renewed lease. The circumstances of this case are particular. Samuel Carte, the plaintiff's father, was a prebendary of Tachbrooke, to which there is an estate belonging that fell to him in 1714. From that time he demised it to one of his children for 21 years; and the child, that was named lessee, executed a declaration "of trust, declaring that his name was [*154] made use of in such lease, in trust for the father for so many years as he should live of the term, and then for such person or persons as he should by deed or will appoint; and, in default thereof, to and among all his children equally. Such lessee generally surrendered the lease yearly, and Samuel Carte granted a new one. In August, 1735, he leased the prebendal estate to his daughter, Sarah, the defendant, who executed a declaration of trust. On the 19th January, 1735-6, Samuel Carte made his will; and, after giving some legacies, bequeathed to his eldest son, Thomas, the plaintiff, all the rest of his goods, chattels, and estate, whether real or personal, in possession and reversion, and made him executor. Then, by a supplemental clause, he added: "Item, it is my mind and will, that my eldest son, Thomas, shall have the disposal of the lease of my prebend of Tachbrooke, made to my daughter, Sarah, and that he shall receive to himself all the profits and advantages arising and accruing from it." The lease in the year 1735, devised by the will, was surrendered in 1736, and several new leases were made, and the subsisting lease, the lease in question, was dated the 24th September, 1739, and made to the defendant, Sarah, who, on the same day, executed a declaration of trust; in trust for the father, for so many years as he should live of the term; then for such person or persons as he should by deed or will appoint; and, in default thereof, to and for the benefit of the defendant, Sarah, and every other child of Samuel Carte, share and share alike. The 16th April, 1740, Samuel Carte, the testator, died. The bill was brought by Thomas, the eldest son, claiming the whole benefit of the lease in 1739, and praying that the defendant, Sarah, might assign

it to him. The defendants, Samuel and Sarah, said, that the plaintiff was entitled *only to a third, for that the lease in 1739 was a re- [*155]
 vocation of the will, and did not pass by it. Lord Hard-
 wicke: "The general question is, whether the benefit of the renewed
 lease in 1739 passed to the plaintiff by the will of his father in 1735,
 either by the original will, or subsequent additions to the will. I am
 clear of opinion the will was sufficient to pass it under the circumstances
 of this case: the question here arises altogether on the penning of the
 will, and not from the inability, in point of law, to give it [the lease.]
 There is no question but a man, by will, may bequeath a term of years
 which he has not in him at that time, but comes to him afterwards: there-
 fore all these cases of revocations of bequests of terms for years arise
 from the short penning of the will; and if, in the case of *Abney v. Mil-*
ler, the testator had said, I give all the *interest* I have in the lease, there
 is no doubt but it would have passed. So that there is no question con-
 cerning the inability to devise, but the want of a proper form of words.
 If that is so, and a form of words may be used, which would pass a sub-
 sequent renewed interest after making the will; then the question is,
 whether the words here are sufficient to pass this interest; and clearly
 they are. I take the construction of the supplemental clause in as ex-
 tensive a manner as if he had particularly recited and repeated the lease
 and declaration of trust, and given it to his son, and the effect would
 have been to have given him the whole trust. What was that? Most
 certainly not the trust of the then existing term only, but also all the
 renewals, and extends to all future leases as well as those in being. The
 devise in this will extends to the whole trust, and the word "advantages"
 is undoubtedly sufficient to take in all the advantages and benefits belong-
 ing to the trust. It comprised not only the profits, but the renewals,
 which are consequential. The words of the will are very [*156]
 *sufficient to pass not only the trust and beneficial interest
 then subsisting, but also the renewed lease." (s)

"It is clear," observed the Vice Chancellor, in *Colegrave v. Manby*,
 "that if a testator simply bequeaths a lease, of which he is possessed at
 the making of his will, and afterwards renews that lease, the legatee is
 not entitled to the benefit of the new lease; for the new lease is not
 given to him, but the old lease only, which is adeemed and gone. It is
 equally clear that a testator may, if he pleases, in the case of a chattel
 lease, give not only the actual lease of which he is possessed at the mak-
 ing of his will, but such renewed or other lease of the same premises, as
 he happens to be entitled to at the time of his death. In every case,
 therefore, where the lease has been renewed by the testator, after the
 making of his will, the true inquiry is, whether it appears upon the will
 to have been the testator's intention that the legatee should take, not
 merely the actual lease, if it subsisted at his death, but any renewed or
 other lease of the same premises which he might then happen to be pos-
 sessed of." (t)

As it is in the power of a person prospectively to devise a lease for
 years; so, likewise, a person may, if he pleases, prospectively devise

(s) 3 Atk. 174.

(t) 6 Madd. Rep. 93.

land which he may be possessed of for years at the time of his death.^(u) But if a tenant for years devises land, by any name, as land, messuage, tenement, or the like, and the lease expires before his death, the devise ceases at the end of the lease; and if the testator takes a new lease for years of the same land, the land will not pass under the will, unless, after [*157] the lease is *renewed, the will is republished,^(v) or, there are farther words in the will which shew the devise in it to be prospective.^(w)

In *Rudstone v. Anderson*, a person devised: "I devise all my lands, tenements, and hereditaments at Westow, in Yorkshire; and all my tithes and ecclesiastical dues, payable out of Westow aforesaid, or any other towns or places near the same." At the time of making the will the testatrix was seised in fee of an estate at Westow, and possessed of a lease of tithes under the Archbishop of York. But, after the making of the will, she surrendered that lease, and took a new one, of which she was possessed at the time of her death. "I own," said the Master of the Rolls (Sir John Strange,) "I cannot see any real distinction between the words in this will, 'all my tithes at Westow,' and if it had been, all my lease or interest in that lease at Westow; because that must refer to the interest she had at the time of making [the will.] That interest does not remain at the death; for, by the surrender, she so far altered her interest, that what were her tithes, under the lease at making the will, cannot be considered as being the same at the time of her death; but she acquired a new estate in them to commence at, and run out to, a different period of time. The question then is, whether this is in such a light as will sufficiently pass these tithes, her property in which was so greatly altered by the surrender and acceptance of a new lease. Sir Thomas Abney v. Miller,^(x) is in point; for it was held, that the lease being thus altered, the interest under the new lease would not pass. There is no difference between that case and *this. There it was men- [*158] tioned his "estate:" here it is "my tithes," that is, my estate in the tithes: so that, although it may be a little harsh, in a case of this nature, to separate these interests, yet I cannot see how the Court can say, these tithes, under the description in this will, have not received such an alteration in their nature as to require republication of the will. It must then be considered, that the testatrix acquired a new interest subsequent to the will; and consequently they [the tithes] will not pass by the words used, but go into her personal estate."^(y) In *Hone v. Medcraft*, a testator devised: "I also give and bequeath to Temperance Bedford the perpetual advowson and disposal of the living or rectory of Waverdon for ever; together with the tithes of all sorts thereof." The rectory of Waverdon was held by the testator, at the time of the devise, by lease from New College, Oxford, for the term of 10 years; and after the will made, he surrendered up that lease, and took a new lease from the college for 10 years more; and was possessed of the rectory by virtue of that lease at the time of his death. By Lord Thurlow:—"I have looked over *Abney v. Miller*, and all the other cases on the subject, and

(u) 3 Atk. 176. *James v. Dean*, 11 Ves. 283; 15 Ves. 236; 6 Madd. Rep. 84. *Hone v. Medcraft*, 1 Bro. C. C. 281. *James v. Dean*, 11 Ves. 283; 15 Ves. 236.

(v) *Coppin v. Farnybhough*, 2 Bro. C. C. 291. (x) 2 Atk. 593.

(y) 2 Ves. 418.

(w) *Rudstone v. Anderson*, 2 Ves. 418.

I find I must contradict them all, if I do not construe this devise of the leasehold estate, which was afterwards surrendered, to be a lapsed devise: it must be part of the personal estate.”(z)

In *James v. Dean*, a lessee for years devised:—“I also give and bequeath to my wife, during her life, all my messuages, lands, and tenements, with the appurtenances in Vine-street, in the parish of Lambeth, which I hold by lease under Sir William East, for all the residue of my term and interest therein; and after her decease, I give and bequeath the same to my godson, Thomas James, his executors *and administrators, for all the residue of the term or interest I shall [*159] have to come therein at my decease.” Lord Eldon held, that, by the context, the same lands held under a renewed lease passed by the devise. “I agree,” said his Lordship, “that in *Coppin v. Fernyhough*, and *Hone v. Medcraft*, this general principle is established; that where there is a general bequest, in the terms, ‘all my leasehold estates,’ and the testator afterwards surrenders, and takes a new lease, that is a revocation. But it depends upon the context of the whole will, whether that general doctrine is to be applied. A leasehold interest for years may be disposed of by a will, made before the testator acquired that interest. But the general doctrine is, that you must shew that intention.” His Lordship then observed on other bequests in the will; and proceeded, “In the disposition over after the decease of his wife, is not the effect a declaration that he gives all? ‘The same,’ means ‘messuages, lands, and tenements;’ not this interest; but all he shall have to come therein at his decease. These words are too plain to be narrowed in construction, so as to say, he meant nothing more than what he had at the date of the will, and that, if he had any interest to come at his decease, he meant to give no part of that, if it was a new term or interest.”(a)

SECTION XII.

OF DEVISES BY PERSONS WHO HAVE BOTH LANDS IN FEE AND FOR YEARS.

If land is devised by any name given to land, as land, messuage, tenement, or the like, by a person who is seised in fee of land, and is possessed also of land for years; the *devise is interpreted to be of the freehold land alone, and will not pass the leaseholds, unless [*160] there is farther evidence in the will, or collateral evidence, which explains the intention to be to extend the devise to them.

Rose v. Bartlett was an ejectment for 40 acres of land, and two acres of meadow, in Burnham. A special verdict was found, that Philip Scudamore was seised in fee of the land in the declaration, and demised it, by the name of four closes of pasture in Burnham, for 100 years, to Richard Batyne; and that Richard Batyne, being possessed of the land, and being seised in fee of other lands and tenements in Burnham, devised in these words:—“I will that my wife Elizabeth shall have Burnhams, and the lands thereunto belonging, being three half-acres in Lentfield. And my will is, if she do marry, my son Nicholas shall have Burnhams,

(z) 1 Bro. C. C. 261.

(a) 11 Ves. 323; 15 Ves. 236.

and three half-acres lying in Lentfield. I will and bequeath to my said wife Elizabeth all the rest of my lands lying in the parishes of Burnham and Hitchman, during the time of her life, and afterwards to my son, Bartholomew." On this will, "all the Justices, *absente* Richardson, resolved, that if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years; and if a man hath a lease for years, and no fee-simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be merely void."(b)

Rose v. Bartlett has been followed in the cases cited in the margin.(c) [*161] In all of them, leaseholds for years were *held not to pass under the devise which passed the freehold land. The devise, and circumstances in each of these cases, it may be of practical utility here to transcribe.—

In Davis v. Gibbs, Lady Boreham, being seised in fee of lands in Kent, and possessed of a mortgage for years of the manor of Cranbroke in Essex, and of an extended interest upon a statute in the manor of Bow-Brickhill in Bucks., devised all her manors, messuages, lands, tenements, hereditaments, and real estate whatsoever, in Kent, Essex, Bucks, Bedfordshire, or elsewhere within the kingdom of England, of which she was any way seised or entitled to, unto her nephew Henry Davis, and to her niece Elizabeth Gibbs, for their lives, equally share and share alike; and, after their decease, then the testatrix devised her said real estate to the right heirs of her said nephew Henry Davis, and of her said niece Elizabeth Gibbs, equally, in equal parts; to hold to them and their heirs as tenants in common. By a farther clause, the testatrix, after several legacies, gave all the rest, residue and remainder of her personal estate, plate, gold, &c., and all her mortgages, bonds, specialties, and credits, whatsoever they should consist of, after her debts and legacies paid, unto her said nephew Henry Davis, and her said niece Elizabeth Gibbs, equally to be divided between them; and made her nephew and niece executors.(d) In Knotsford v. Gardiner, John Colchester, seised in fee of several freehold lands, and possessed of several leasehold lands in the same parish, devised: "I give, devise and bequeath unto Martha, my wife, for life, all my estates in London, &c.; and, after her decease, I give, devise and bequeath the aforementioned estates to my daughter Ann Colchester, and her heirs for ever. Item, I give and bequeath unto my wife all my goods and chattels, and all other things not before bequeathed; and I make my wife sole executrix."(e) Pistol v. Riccardson

[*162] was an ejectment *for two leasehold farms in Cumberland. The case reserved stated, that one Christian Riccardson, being seised in fee of several lands, and also possessed of the two farms in question for the remainder of two terms of 1000 years, devised "all and every of his several lands, messuages, tenements, and hereditaments, whatsoever and wheresoever, whereof he was seised and interested in or

(b) Cro. Car. 393.

(c) Davis v. Gibbs, 3 P. W. 26; Knotsford v. Gardiner, 2 Atk. 450; Pistol v. Riccardson, 1 H. Bl. 26 note (a); (see Addis v. Clement, 2 P. W. 456, & 6 T. R. 353.) Chapman v. Hart, 1 Ves. 271; Whitaker v. Ambler, 1 Eden. 151; Thompson v. Law-

ley, 3 Bos. & P. 303. (In this case there is an elaborate judgment of Lord Eldon, who reviewed the cases which preceded it). 5 Ves. 476, S. C.

(d) 3 P. W. 26.

(e) 2 Atk. 450.



entitled to," to his son for life, remainder to the heirs of his body. He then devised his personal estate to his wife and daughter, and made the wife sole executrix.^(f) In *Chapman v. Hart*, the testator devised "all his lands and tenements in or near Fowey," to the plaintiff. In this case, the will was attested by two witnesses only.^(g) In *Whitaker v. Ambler*, Richard Whitaker, being seised in fee of freehold estates in the counties of Lancaster and Chester, and also possessed of leaseholds for years in Manchester, by his will, after giving some small legacies, gave and bequeathed all the rest, residue, and remainder of his personal estate, of what nature or kind soever the same might be, or wheresoever found, unto his wife, Mary Whitaker to her sole and separate use for ever. He also gave and bequeathed all his real estates, wheresoever situate, lying, and being, unto his said wife, Mary Whitaker, for and during the term of her natural life; and from and after her decease, he gave and bequeathed the same to trustees, their executors and administrators, on certain trusts; and, subject to such trusts, he gave, devised, and bequeathed all his said real estate to his nephews, Robert and Benjamin Whitaker, and their heirs for ever.^(h) In *Thompson v. Lawley*, Beilby Thompson being seised in fee of the manor of Wheldrake, in the county of York, and other real estates, and also possessed of a considerable personal estate, including, among other things, two leasehold houses, one situate at Putney "in Surrey, and the other in Mortimer street, Cavendish-square, held on beneficial leases; by his [*163] will, after directing that his funeral expenses, debts, and legacies, should be paid out of his personal estate, but, if his personal estate should not be sufficient to pay the same, his real estate should be charged with the deficiency; gave and devised his manor of Wheldrake, and all other his manors, messuages, lands, tenements, and hereditaments, to trustees and their heirs, to the use and for the trusts after-mentioned; that is to say, as to his said manor of Wheldrake, and all his other tenements and hereditaments in the parish of Wheldrake, in trust for the payment of certain annuities. He then devised as follows: as for and concerning the said manors, messuages, and other hereditaments, so charged with the said annuities; and as for and concerning all other his manors, messuages, lands, tenements, and hereditaments, in the said county of York, or elsewhere in the kingdom of Great Britain, to the use, &c. [uses in strict settlement.] After several farther devises and bequests, the will proceeds: "Lastly, I give and bequeath all my monies, securities for monies, goods, chattels, and effects, and all other my personal estate, not hereinbefore by me disposed of, to my brother, Richard Thompson, and to my sister Lady Lawley, in equal shares and proportions." The testator appointed his said brother and sister executors of his will.⁽ⁱ⁾

In the judgment, in the last case, it is said by Mr. Justice Rooke: "My opinion is founded on the case of *Rose v. Bartlett*; which I consider as a rule of property not to be shaken. The cases cited^(j) in opposition to the rule have all admitted it, but have proceeded on special "circumstances. With respect to the rule itself, Lord Hardwicke expressly said, it was not to be departed from; and [*164]

(f) 1 H. Bl. 26, n.(a).

(g) 1 Ves. 271.

(h) 1 Eden, 151.

(i) 2 Bos. & P. 303, 5 Ves. 476.

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(j) *Turner v. Husler*, 1 Bro. C. C. 78.
Addis v. Clement, 2 P. W. 456. *Lane v. Lord Stanhope*, 6 T. R. 345.

Lord Mansfield held the same doctrine. I cannot agree that the rule has been so far shaken, that the *onus* is to be thrown on the personal representative of shewing that the leaseholds are not intended to pass: on the contrary, I think that the leaseholds must be taken not to pass, unless special circumstances can be shewn clearly demonstrative of a contrary intent.”(k)

The rule in *Rose v. Bartlett* is a rule founded on the *intention*(l) of the testator. Clearly, if it is the intention to pass leaseholds for years with the lands held in fee, the rule will not apply. It has been considered, on the intention not to apply in several instances.(m) In *Addis v. Clement*, Thomas Addis, seised in fee of land, and possessed of a lease for 21 years held of the church of Hereford, and other lands in D., all in the possession of A. and B., tenants at certain rents; and it being by reason of the long unity of possession very difficult to distinguish the fee-simple from the leasehold premises; devised all his messuages, lands, and tenements, in the parish of D., which he then stood seised or possessed of, or any ways interested in, and which were in the possession of A. and B., to his wife, Jane, for life, remainder to his brother, James Addis, and the heirs of his body, if then living; remainder, if his brother James were then dead, or should die without issue, to the plaintiff, John Addis, for life, with a power to make a jointure; remainder to trustees to support, &c.; remainder to the first, &c., son of the plaintiff, John Addis, in tail-male successively; remainder to the testator's sister, [*165] Eleanor Bradshaw, for life; with *remainder to her first, &c., son, in tail-male; remainder to the testator's brother-in-law, Thomas Delahay, in fee. And all his goods and chattels, money, and personal estate, were bequeathed to his wife, Jane Addis, who was also made executrix. Against the plaintiff it was objected, that the leasehold premises, especially for so short a term as 21 years, could never have been intended by the testator to pass either for life or in tail, or to trustees to preserve contingent remainders; neither could it be supposed the testator thought of empowering the plaintiff, the devisee for life, to make a jointure thereof; and that here being some fee-simple lands which would satisfy the words, the leaseholds should be included in the bequest of the personal estate to the wife. By the Lord Chancellor King: “The question upon this will of Thomas Addis is, whether the leasehold passes with the freehold. I must own the limitations are improper; but then, the words of the will are very strong; all the lands which the testator was ‘seised or possessed of, or any ways interested in,’ which words ‘possessed of or interested in,’ properly refer to a leasehold estate, and distinguish the present case from that of *Rose v. Bartlett*, where the words ‘possessed of or any ways interested in,’ are not to be found. And as this lease for 21 years was held of the church, and was always renewable, the testator might look upon himself, from the right he had to renew, as having a perpetual estate therein, a kind of inheritance; and, therefore, the leasehold premises ought, I think, to pass by this will.”(n)

(k) 2 Bos. & P. 319.

(l) Ibid, 312, 318.

(m) *Addis v. Clement*, 2 P. W. 456. See 6 T. R. 353, 354. *Hartley v. Hurtle*, 5 Ves.

540. *Dixon v. Dawson*, 2 Sim. & St. 327.

Slawin v. Farside, ibid, S. C.

(n) 2 P. W. 456.

In *Hartley v. Hurle*, a person gave, devised, and bequeathed all his messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, to (trustees) their heirs, executors, administrators and assigns, according to the several and respective estates and interests therein, upon trust out of the rents, issues, and profits of his said messuages, lands, tenements, and hereditaments, to pay, &c. [various trusts;] [*166] and upon farther trust, to pay all the rest and residue of the said rents, issues, and profits, (subject to ground-rents and other out-goings in respect to his said messuage, lands, tenements, and hereditaments,) to, &c. The Master of the Rolls (Sir Richard Pepper Arden:) "The first words 'messuages, lands, tenements, and hereditaments,' alone, certainly would not pass a leasehold estate; but I am clearly of opinion, that what follows is sufficient. He gives his messuages, lands, tenements, and hereditaments, to the trustees, their heirs, executors, administrators and assigns, according to the several and respective estates and interests therein; and the word 'ground-rents' puts it out of all doubt." (o)

It should seem, farther, that leaseholds for years will pass by the same clause which devises the fee-simple lands of the testator, if they appear to be *separately* named by any word in the devise. In the following cases, they have been understood to be separately named by the words 'mines,' 'rents,' and 'farms.' In *Lowther v. Cavendish*, Sir James Lowther, being seised in fee of a large real estate, and possessed of leasehold estates in Cumberland, on which he had several coal and lead mines, gave and devised all his manors, messuages, lands, tenements, mines of coal, lead, and all other mines, rectories, advowsons, tithes, rents, and hereditaments whatsoever, situate, lying, and being within the county of Cumberland, to Sir William Lowther [in strict settlement.] The testator, lastly, bequeathed all his goods, chattels, and personal estate, not otherwise disposed of, to Sir William Lowther, whom he appointed sole executor. The testator's estates in Cumberland consisted both of lands of inheritance, and of collieries and lands held under sixteen different leases from various persons. On this will and [*167] the circumstances, the Lord Chancellor Northington, who made many observations on the cases of *Rose v. Bartlett*, and *Addis v. Clement*, decided principally on the words 'rents' and 'mines of coal' in the devise, "that the leaseholds passed entailed with the other lands to Sir William Lowther, and not by the residuary clause, or the constituting him executor." (p) In *Lane v. Earl Stanhope*, a testator was seised in fee of freehold messuages, lands, and hereditaments in the counties of Kent, Essex, and Surrey; and particularly of 230 acres of land, part of a farm in the parish of Buckland, and Buckland Dane, in Kent; which farm contained 390 acres, of which the 230 mentioned were freehold. And he was possessed of 160 acres, the residue of such farm, under a lease from the Archbishop of Canterbury for 21 years, which lease was renewable. The whole of the farm, as well the leasehold as the freehold parts of it, was at the time of making the will and of the death of the testator, in the occupation of Ingram Bromley, as his tenant; and was held by Bromley, and had been as far back as could be discovered, held by former tenants, as one entire farm, without any distinction as to any part of it being freehold or leasehold. The testator, being so seised and possessed,

devised in the words: "I give and devise all my manors, messuages, or tenements, houses, farms, lands, wood-lands, hereditaments, and real estate, whatsoever, and wheresoever, to Richard Bettinson" [in strict settlement;] all the rest and residue of my ready money, rents in arrear, and personal estate whatsoever, I give and bequeath to the said Richard Bettinson, whom I do hereby make and appoint sole executor and residuary *legatee." Principally on the word 'farms' in this [*168] will, it was determined that the leaseholds for years passed under the devise of the lands of inheritance.(q)

SECTION XIII.

OF DEVISES BY PERSONS WHO HAVE BOTH FREEHOLD AND COPYHOLD LANDS.

A DEVISE of copyholds is an appointment of a use. The Stat. of Wills, 32 Hen. VIII., c. 1, does not extend to copyholds; nor, by the common law, are they, by particular custom, devisable, excepting by way of appointment in pursuance of a surrender to the use of the will. Before the statute 55 George III., c. 192, a will of copyholds was at law, and, excepting particular cases, in equity also, ineffective without the surrender.(r) That act makes the surrender simply unnecessary. It neither invalidates the surrender if made, nor empowers a copyholder to make a will. A will of copyholds is still an appointment.(s)

If land is devised by any name given to land, as land, messuage, tenement, hereditament, or the like, by a person who has both freehold and copyhold lands; it should seem, that the devise is always at law, and, excepting the single instance of a devise for payment of debts,(t) in equity also, interpreted to be of the freehold land alone, and will not pass the copyholds, unless there is farther evidence in the will,(u) or collateral evidence, which explains the intention to be to extend the devise [*169] to them.(v) *In *Hawkins v. Leigh*, a person devised in the thereof as follows; videlicet, In regard a great part of my lands are already settled, and the great tenderness and affection, and prudent management I have always found in my wife Catherine; for the kindest return and acknowledgment, therefore, I give all my lands unsettled, and all my goods and chattels of what nature and kind soever, to my said wife for life, and afterwards to my younger children, in such manner as she shall think fit to dispose of the same." The testator died seised of freehold land in fee-simple, and also seised to him and his heirs of customary messuages held of the manor of H. and B.: and were [that is, both the freehold and copyhold were,] unsettled lands, and the latter not surrendered to the use of his will. Lord Hardwicke:—"The only

(q) 6 T. R. 345. See 9 Price, 577.

(r) *Milbourn v. Milbourn*, 2 Bro. C. C. 64.

(s) *Noel v. Hoy*, 5 Madd. 38.

(t) *Sampson v. Sampson*, 3 Ves. & B. 337.

(u) *Doe v. Earl Lucan*, 9 East, 448.

(v) *Hawkins v. Leigh*, 1 Atk. 387. *Byas v. Byas*, 2 Ves. 164. *Judd v. Pratt*, 13 Ves. 168; 15 Ves. 390. *Hodgson v. Mores*, 9 Price, 556.

question is, as to the copyhold estate, whether it passed by the will; and this must depend upon circumstances. Where there is a general devise of lands, and there is no surrender of the copyhold lands to the use of the will, the construction at law is, that they do not pass by the will; especially, where there are other words which may answer the intention of the testator mentioned in the will; for copyhold lands are not properly the subject of a devise, as they pass by the surrender, and not by the will. I do not think the outset of the will, 'my worldly estate and goods,' will carry it farther than the subsequent words, 'all my lands unsettled, and all my goods,' &c.; for as the lands settled were only freehold, naturally, the lands unsettled must be of the same kind. Therefore, I am of opinion, upon the words of the will, the copyhold lands will not pass."(*w*) The word '*especially*,' used by Lord Hardwicke in this decision, amounts, it is apprehended, to *à fortiori*. The meaning *of his Lordship appears to be, that where there is [*170] a general devise of land, and there is no surrender of the copyhold lands to the use of the will, at law, the copyholds will not pass: *à fortiori*, therefore they will not pass, if the testator has freehold lands to satisfy the words of the devise. In *Byas v. Byas*, a person seised of freehold land, and of copyholds of the nature of Borough-English descendible, not only to the younger son, but to the younger daughter, which copyholds were not surrendered to the use of his will, in the introduction to his will desired all his just debts to be paid; then made a provision for his daughters and his wife, and a further eventual provision for the daughters after the death of his wife; and gave all the rest and residue of his estate, real and personal, of what nature and kind soever the same might be or consist of, at the time of his death, to his wife, her heirs, executors, administrators and assigns. By the Master of the Rolls, Sir John Strange:—"The will stands for consideration on the general expression, 'all the rest,' &c. The cases have turned, in the construction, on the question of fact, whether the testator had what would answer the words of his will, on which the words would operate. Then [that is, if he had,] the surrender should not be supplied [in favour of a wife or children;] as was before Lord Talbot, in 1735, and the case of Bethlehem Hospital, 10th June, 1735, that 'all my lands' would not pass copyhold lands not surrendered, if there were other lands to satisfy the words; but, if surrendered, that will explain the general words, and pass them. Here is that which would come within the description of 'real estate.' Then, without a surrender to the use of the will, or mention of copyhold, the court will not take it from the heir. In the present case, there is nothing, either by act, as by surrender, or by words, although no surrender, to warrant the *court to say, the younger daughter is disinherited of that, which, by law, ought to descend to her, [*171] and that the mother is entitled to the benefit of this copyhold."(*x*)

Before the statute 55 George III., c. 192, if a person, seised of freehold and copyhold land, made a general devise of land for the payment of his debts, but did not surrender his copyholds to the use of his will, if the freeholds were not sufficient for the purpose, the court of Chancery, in favour of the creditors, accepted the direction for payment of debts to

imply an intention in the testator to include the copyholds in the devise, and, on the intention, supplied the surrender. Thus, in *Drake v. Robinson*, a testator devised all his real estate to trustees and their heirs, for the payment of his debts. He was seised of several freehold and copyhold lands, but did not surrender the latter to the use of his will. Part of the copyhold was of the nature of Borough-English. It was objected: "The copyhold does not pass by this devise; for although, in the case of creditors, equity will supply the place of a surrender, yet the copyhold ought ever to be mentioned in the will, especially where, as in the present case, there is a freehold estate that will satisfy the words of the will." By the Lord Chancellor Parker: "If the copyhold passes, the youngest son, who is entitled to such part thereof as is Borough-English, must contribute to pay his proportion of the debts. As betwixt the sons it is a doubtful case; but, with regard to the creditors, if there be not an estate sufficient for the payment of the debts, without the copyhold lands, my opinion is, that these ought to pass. The man is not a just man, unless he takes [*172] care to pay his debts; for *which reason, he has made choice of words large enough for that purpose, a copyhold estate being a real estate. And since the testator's first intention is to be honest, and pay his debts, to cramp such his design, by a narrow construction, seems like being accessory to the making such testator a knave, even against his will. But let the Master first see, whether there be enough without the copyhold for the payment of the debts." (y) In *Haslewood v. Pope*, it was determined by the Lord Chancellor Talbot, that "if a man devises all his lands, tenements, and hereditaments, in trust to pay his debts and legacies, and the testator has some freehold and some copyhold lands, only the freehold lands shall pass, for his will must be intended of such lands and tenements as are devisable in their nature. *Secus*, if the testator had surrendered his copyhold lands to the use of his will, because this shows he did intend to devise his copyhold. But even, in the first case, if the freehold were not sufficient to pay his debts, when the testator devises all his lands in trust to pay his debts, it seems, rather than the debts should go unpaid, that the copyhold shall in equity pass." (z)

Since the statute 55 George III., c. 192, a surrender not being essential, at law or in equity, to the validity of a will of copyholds, it should seem, that if, at the present day, a person devises land, generally, for the payment of his debts; in equity, the simple direction for the payment of debts, without supplying the surrender, will be sufficient to extend the devise to the unsurrendered copyhold lands of the testator, provided the freehold lands are not sufficient for the purpose. But it has been determined, that if the freehold lands of the testator are sufficient [*173] to satisfy the debts, the copyholds *will not pass, even in equity, by the general devise in the will. (a)

If there is a devise of land, generally, in a will, it appears collateral evidence is admissible to explain the intention to be to include copyholds in the devise.

In *Car v. Ellison*, William Car devised as follows: "I give and devise

(y) 1 P. W. 443.

78. *Lindopp v. Eborall*, 3 Bro. C. C. 188.

(z) 3 P. W. 322.

See also *Ithell v. Beane*, 1 Ves. 215. *Tudor*

(a) *Mallabar v. Mallabar*, Cas. temp. Talb.

v. Anson, 2 Ves. 582.

all my messuages, lands, tenements, and hereditaments, in St. Helen's, Auckland, and elsewhere in the county of Durham, and all other my real estate, to Sir Ralph Milbank and ——— Hedworth, and to their executors and administrators, for 500 years [on various trusts;] and, after the determination of the said term I give all the premises to my wife for and during her natural life, without impeachment of waste." The copyholds were not surrendered to the use of the will, the testator having an equitable estate only in them, the legal estate being in trustees. By Lord Hardwicke: "I am of opinion the trust of these copyhold estates will pass without a surrender to the uses of the will. This being out of the case, the next question is, whether here is a sufficient indication of the testator's intention that the trustees should have the copyhold as well as the real [freehold] estate. As to this, the words of the will and the nature of the case must determine it. There is no dispute but the words are large enough to pass the copyhold lands. There cannot possibly be larger to pass any real interest a testator has in lands, than 'all other my real estate.' The words, then, being large enough, the next question is, whether it appears to be the intention of the testator they should pass. The real estate was originally the inheritance of the wife, consisting of part *freehold and part copyhold. Upon [*174] the marriage, the freehold lands were by settlement conveyed, by the fine of the husband and wife, to Sir Ralph Milbank and ——— Hedworth, in trust for the husband and wife, during their joint lives, and the survivor, with remainder to the heirs of their two bodies, remainder in fee to the husband. Mr. Car and his wife likewise made a surrender of the copyhold lands to the same trustees, and for the same purposes, with the freehold lands. After this, the husband makes his will. What appears to be the intention? Why, as the wife had been so generous as to give the remainder in fee to him, he was willing to return the compliment to her. It cannot be presumed that the testator intended to sever the copyhold, which came at the same time with the freehold, and, therefore, this is a strong circumstance to indicate the testator's intention; and to construe it otherwise would be to dismember the estate, which could never be meant, when he devises to the same trustees as were under the settlement. The material circumstance here is, the intention of the testator to restore the estates to the wife, from whom they originally came; and, therefore, he could not mean to dismember and sever the copyhold estate from the freehold." His Lordship decreed the copyhold land passed to the trustees by the general words of the will. (b)

It farther appears, that a *surrender* of copyholds to the use of a will (for the statute of George III. does not invalidate a surrender,) is, at least in equity, admissible collateral evidence to prove that copyholds are meant by the testator to be included in the general devise in his will. In *Tendrill v. Smith*, it is stated by Lord Hardwicke: "Where copyhold lands are surrendered to the use of a will; by a devise of lands generally, the copyhold will pass, notwithstanding *there are freeholds to answer such devise." (c) And, again, in *Goodwyn v. Good-* [*175] *wyn*, where a testator devised "all his messuages, lands, tenements, and hereditaments whatsoever, in Norfolk;" Lord Hardwicke was of opinion,

(b) 3 Atk. 78.

(c) 2 Atk. 85.

"that the copyhold lands were comprised, from the intent to pass them; although there are several cases, that a devise in general words of all lands and tenements will not comprise copyhold lands, which are not surrendered to the use of the will, so as to show an intent to comprise them. And where the intention of the testator of raising portions or payments of debts may be answered by freehold lands, the court will not suppose he intended to pass the copyhold. And, although surrendered, yet if the words are not sufficient to take them in, they will not pass. But here they are sufficient, and the surrender effectuates that intent." (d) In *Doe v. the Earl of Lucan*, it is said by Lord Ellenborough: "In construing the devise in question, I shall proceed merely on the testator's intention, as I collect it from the face of the will; for I am afraid to look at any argument of intention to be derived from the surrender to the use of his will; although perhaps it may be proper to be regarded even in this Court, as it certainly would be in another court, but it is not necessary for me to give any opinion upon that point, for I profess to determine this case on the intention, as collected from the words of the will only." (e) On this passage it is observable, that it appears from many authorities, that, in general cases, if an intention is discovered in a will, (f) collateral evidence, unless it tends to have no legal effect, (g) is [*176] admissible to explain it; that the evidence is *admissible at law and in equity; that it appears, in equity, a surrender to the use of a will is, on a devise of land generally, evidence sufficient of an intention to include the copyholds; and that in *Tendril v. Smith*, and *Goodwyn v. Goodwyn*, the expressions of Lord Hardwicke are general, without distinction of courts.

It remains to notice, that copyhold lands will pass by the same clause which devises the freehold lands of the testator, if the copyholds appear to be *separately* named by any word in the devise. In *Doe v. the Earl of Lucan*, they were held to pass principally under the word '*farms*' in the devise. (h)

SECTION XIV.

OF A DEVISE WITHOUT WORDS OF INHERITANCE.

THE technical effect of a limitation to A., without adding any words of inheritance, is to convey to A., a life-estate only. If, therefore, a person seised in fee, devises to A., without any words of inheritance, the legal effect of the devise is to convey to A. an estate for life only, unless there are farther words in the will which explain the intention to be, to give to the devisee a greater estate. (i) "Another distinction," said Lord Mans-

(d) 1 Ves. 226.

(e) 9 East, 460.

(f) *Goodtitle v. Southern*, 1 M. & S. 299. *Doe v. The Earl of Jersey*, 1 Barn. & A. 550; 3 Barn. & C. 870. See Chapter III.

(g) *Doe v. Greening*, 3 M. & S. 171. *Doe v. Westlake*, 4 Barn. & A. 57.

(h) 9 East, 448.

(i) *Roe v. Blackett*, Cowp. 235. *Denn v. Gaskin*, *ibid*, 657. *Right v. Sidebotham*, Dougl. 730. *Roe v. Bolton*, and *Right v. Russell*, cited *ibid*, 732. *Hay v. Earl of Coventry*, 3 T. R. 83. *Goodtitle v. Edmonds*, 7 T. R. 635. *Doe v. Allen*, 8 T. R. 497. *Foster v. Lord Romney*, 11 East, 594. *Denne v. Page*, *ibid*, 603, note (b). *Doe v. West-*

field, in a case before him, after observing on prospective devises of lands of inheritance, "founded on the notion that a will affecting lands is merely a species of conveyance, and derived *from the same source, is this: The law of England, in the conveyance of [*177] real estates, requires words of limitation, in the donation or grant, to the creation of a fee. Without the word heirs, general or special, no man can create a fee at common law by conveyance. When wills, therefore, were introduced, and devises of real property began to prevail; being considered as a species of conveyance, they were to be governed by the same rule. Therefore, by analogy to that rule, in the construction of devises, if there be no words of limitation added, nor words of perpetuity annexed, which have been held tantamount, so as to denote the intention of the testator to convey the inheritance to the devisee, he can only take an estate for life. For instance, if a testator by his will says, I give my lands, or such and such lands, to A.; if no words of limitation are added, A. has only an estate for life."(*j*)

It frequently happens in a will, that two estates are separately devised to the same person; one with words of inheritance, and the other without them. In these cases, it appears, the devise of inheritance is not, by itself, evidence sufficient of an intention to devise both lands for an estate of inheritance.

It is stated in Roll's Abridgment: "If a man devises in this manner; I devise Black Acre to my daughter F., and to the heirs of her body begotten. Item, I devise to my said daughter, White Acre; the daughter shall have but an estate for life in White Acre, for the word 'Item' does not amount to 'in the same manner.'—If a man devises Black Acre to one in tail and also White Acre; the devisee shall have an estate-tail in White Acre also, for this is all one sentence, and so the words which make the limitation of the estate extend to both."(*k*) In [*178] *Spirit v. Bence*, a testator devised in the words: "I give to my son Henry and his heirs freely my house in the borough of Wickwarr, in which I dwell. Item, I give to my said son Henry my house and lands in Impsteade. Item, I give to him two houses in Wickwarr, in the tenure of J. S. Item, I give to the said Henry my pastures, called the South Fields, and one meadow called Warhay, in Wickwarr (the land, in question.) Also, I will that all bargains, grants, and covenants, which I have from Nicholas Webb, my son Henry shall enjoy, and his heirs for ever; and, for lack of heirs of his body, to remain to my son Francis for ever." It was held "that Henry had but an estate for life in the land in question, and that the last clause, 'and for lack of heirs of his body,' shall extend only to the lands in that clause; viz., to the bargains and grants. And that when the testator gave to Henry in fee, and then to Henry only, not mentioning any estate, the law shall construe it that he shall have the lands but for life; and that the testator did not intend a greater estate; and for the word 'also,' it is no more than the word 'and,' and shall not extend to the quantity of the estate, but to the clause following."(*l*) In *Paice v. the Archbishop of Canterbury*, a testatrix devised in the words: "I give and bequeath to the reverend Henry Tay-

ley, 4 Barn. & C. 667. *Fawcett's case*, 1 Roll. Abr. 834. 844. *Roe v. Holmes*, 2

(*j*) Cowp. 306.

(*k*) 1 Roll. Abr. 844.

lor, my farm and lands at Royston in Lincolnshire, to him, his heirs and assigns for ever, and I also give and bequeath to the said reverend Henry Taylor, my farm and manor of Eythorne Court, in the county of Kent." "The only question," said Lord Eldon, "on this devise is, whether the word 'also,' has precisely the same operation as the addition of the words 'his heirs and assigns for ever,' in the devise of the other estate immediately preceding. Upon reflection, although I believe the [*179] court of King's Bench has gone as far in the construction *of the word 'also,' as Sir Arthur Piggott contended, it seems to me, that all the old rules against disinheritance an heir, except by plain words or necessary implication, are gone, if such a construction is to prevail. My opinion therefore is, that this devisee took an estate for life only in the farm and manor of Eythorne Court."(*m*)

After devises of estates of inheritance, it sometimes happens that cross-remainders of the land are limited without words of inheritance. In these cases, unless there are farther words in the will to explain the intention to be different, the devisee takes an estate for life only in remainder.

In *Pettywood v. Cook*, one Hawkins was seised in fee of three houses in Bury, and devised them to his wife for life, the remainder of one other of the messuages to Robert his son, and his heirs, the remainder of one other of the messuages to Christian, his daughter, and her heirs; and of the third messuage, to Joan, his daughter, and her heirs. And did further will that if any of them died without issue, that then the survivors should enjoy *totam illam partem* equally divided between them. All the Justices of the King's Bench held, "that, by the devise, only an estate for life is limited to the survivor; although the words are 'that the survivor shall enjoy *totam illam partem*;' that is [for these words mean,] all the messuage, and not all the estate the party dying had in the messuage; for no estate being limited, it shall be intended but an estate for life."(*n*) In *Woodward v. Glasbrook*, a testator devised a house in Lime-street, to his sons James and Thomas, and the heirs of their bodies, in equal moieties; and devised other houses to his other children in like manner; and then added, "but my will and mind is, that if any of my [*180] said children shall *die before 21, or unmarried, the part or share of him or her so dying, shall go over to the survivors." On this will it was determined, "that, by the devise over, only an estate passed to the survivors for their lives."(*o*)

SECTION XV.

OF A DEVISE FOR LIFE, WITHOUT IMPEACHMENT OF WASTE.

A common devise is to a person for life, without impeachment of waste. Waste appears to be any injury illegally done to the estate, which depre-

(*m*) 14 Ves. 364. The argument of Sir A. Piggott is not reported.

(*n*) Cro. Eliz. 52. Hawkins' case, 2 Leon, 129, 193, S. C.

(*o*) 3 Vern. 388.

ciates the value of the inheritance. To cut down timber, as an instance, is waste. To convert wood, meadow, or pasture into arable; to turn arable, meadow, or pasture into woodland; or to turn arable or woodland into meadow or pasture, are waste: for it not only changes the course of husbandry, but the evidence of the estate, when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even although it is improved in its value. To open the land to search for mines of metal, coal, &c., is waste; for that is a detriment to the inheritance; although, if the pits or mines were open before, it is not considered to be waste to continue to dig them, and the tenant is entitled to their produce, as an ordinary annual profit of the land.(p) The punishment of waste is the forfeiture of the place wasted, and treble damages.(q) He, then, who is tenant for life, "without impeachment of waste," is free of the liability to be sued for waste, and *consequently of the punishment [*181] for it. But, farther, to be unimpeachable for waste, is not [*181] merely the negative privilege of impunity; it is a license to commit waste.(r) In particular, a tenant for life, "without impeachment of waste," is entitled to cut down timber on the estate; and the moment it is cut down, it becomes his own property.(s)

But although a tenant for life without impeachment of waste may legally commit many kinds of waste, he may be restrained by an injunction, out of the court of Chancery, from committing many other kinds of waste, which, in the consideration of the court, were not intended by the testator to be within the protection of the clause, "without impeachment of waste." In *Vane v. Lord Barnard*, the defendant was tenant for life without impeachment of waste, remainder to his son for life, and, having taken a displeasure against his son, got 200 workmen together, and began to pull down the family mansion, Raby Castle; but he was stopped by the Lord Chancellor Cowper, and decreed to repair it.(t) In *Sir Herbert Packington's case*, Lord Hardwicke granted an injunction to restrain the cutting down of timber in a park, the trees being an ornament and shelter to the mansion-house.(u) In *Strathmore v. Bowes*, the husband of a tenant for life, without impeachment of waste, was restrained from cutting down young saplings, not fit to cut as timber; and also from cutting down timber trees in pleasure plantations a mile distant from the house.(v) The principle of granting an injunction to prevent the cutting of trees applies to trees planted for the *ornament [*182] of the *estate*, as distinguished from the ornament of the [*182] mansion-house, although they are distant, and even are not seen from the house;(w) and also to trees planted by a testator purposely for ornament, although, in point of taste, their effect is not ornamental;(x) and, farther, to trees planted for the purpose of excluding objects from view.(y) But it appears, the principle does not extend to a wood, covering thirty acres,

(p) 2 Bl. C. 281, 282.

(q) Ibid. 283.

(r) Co. Litt. 220 a.

(s) *Lewis Bowles' case*, 11 Co. 79 b. Pyne- Dyer 1 T. R. 65. *Williams v. Williams*.(u) 3 Atk. 215. See *Lawley v. Lawley* cited Jacob Rep. 71, note (b).

(v) 2 Bro. C. C. 88.

(w) *Marquis of Downshire v. Lady San-**dra*. 6 Ves. 107.

although ornamental;(z) nor to trees which happen to be ornamental, if they were not planted, nor have been left standing, purposely for ornament;(a) nor to trees planted to protect the estate from the effects of the sea;(b) nor to trees fit for the purposes of timber, although young, and which a tenant in fee, acting in a husband-like manner, would not cut.(c)

SECTION XVI.

OF DEVISES IN JOINT-TENANCY, AND IN COMMON.

A DEVISE to two or more persons creates a *joint-tenancy*, unless it appears to be the intention of the testator to devise to them in *common*.(d)

Few testators can be supposed to understand the technical terms, "joint-tenancy," and "tenancy in common;" although they understand the practical distinctions between a joint interest in land with survivorship, and separate interests in undivided shares of it without survivorship. [*183] If "a testator intends to give to two or more devisees a *joint* interest in all the land, *with survivorship*, he intends to create, what is technically called, a *joint-tenancy*; if he intends to give the devisees, *each separately*, an interest in an *undivided share* of the land, he intends to create, what is technically called, a *tenancy in common*. In a joint-tenancy, the land is not divided: in a tenancy in common, it is; namely, into undivided shares; in other words, into shares of undistinguished land. It is, then, the intent to *divide*(e) the land, which makes a tenancy in common. This intent may be expressed by the words of the devise, or implied in them. Words of non-survivorship of interest will imply division of the land.(f)

A tenancy in common has been held to be created by the following words of devise:—

"I devise, &c., to my wife, for her life; and, after her death, to A. B. and C., and their heirs respectively for ever."(g)

"I will that my lands, called Earth-pits, shall equally remain to Joan and Mary, my two daughters, and the heirs of their two bodies."(h)

"I devise, &c., to my two sons equally, and their heirs."(i)

"I devise, &c., to A. and B., to hold to them, their heirs and assigns for ever, part and part alike,(j) and every of them to have as much as the other."(k)

"I give and devise to my two sons, and their heirs, and the longer [*184] liver of them, equally to be divided between *them and their heirs, after the death of my wife, all that my messuage," &c.(l)

(z) *Burges v. Lamb*, 16 Ves. 174.

(a) *Coffin v. Coffin*, Jacob Rep. 70; 6 Madd. Rep. 17.

(b) *Ibid.*

(c) *Smythe v. Smythe*, 2 Swanst. 251.

(d) *Anonymous*, Cro. Eliz. 431. Clerk v. Clerk, 2 Vern. 323. *Doe v. Ironmonger*, 3 East, 532.

(e) 2 Vern. 323. *Cowp.* 660. 3 East, 537.

(f) 1 Salk. 227. 3 Burr. 1885.

(g) *Torret v. Frampton*, Style, 434.

(h) *Shepherd's case*, cited Cro. Eliz. 444.

(i) *Lewen v. Cox*, Cro. Eliz. 695. See *ibid.*, 444.

(j) See 2 Atk. 122.

(k) *Thorowgood v. Collins*, Cro. Car. 75.

(l) *Blisset v. Cranwell*, 1 Salk. 226. See

1 P. W. 16; and *Thickness v. Vernon*, 1 Vern. 32.

"I devise, &c., [a leasehold for years,] to my wife for life, and, after her death, to A., and her three sons, equally amongst them."(*m*)

"I devise, &c., [two houses, held under a lease for years,] to my nephews, John Prince and John Heylin; and my will and meaning is, that the rents of my said two houses shall be equally shared and divided between them, the said John Prince and John Heylin."(*n*)

"I devise, &c., to (trustees) and their heirs, in trust, to permit my three sisters, and their assigns, to hold and enjoy the said premises, and to receive the rents thereof, to their sole and separate use, as they shall appoint, notwithstanding their coverture; and as my said sisters shall severally die, I give the premises to their several heirs."(*o*)

"I devise, &c. [freehold and leasehold estates,] to A., in trust to pay out of the rents and profits [certain annuities,] and the remaining profits I give to A., in trust for my six younger children, to be distributed among them in joint and equal proportions."(*p*)

"I devise, &c. (to trustees,) and their heirs, on trust, by sale or mortgage of any part, to raise so much to pay all my debts as my personal estate shall not extend to; the remainder of all my estate to go and be equally divided amongst my three younger children, and the survivor of them, and their heirs for ever."(*q*)

"I devise, &c., to my five sons and daughters, and the survivors and survivor of them, and the executors and *administrators of [*185] such survivor, share and share alike, as tenants in common, and not as joint-tenants."(*r*)

"I devise all that my freehold messuage and tenement, in the parish of Dalston, to Matthew Robinson, George Robinson, and Thomas Robinson, equally to them my sister's sons."(*s*)

"I devise, &c., to the use of my niece Susannah Clarke, and my two nieces, Elizabeth Fountain and Ann Fountain, and the survivor and survivors of them, and the heirs of the body of such survivor and survivors as tenants in common, and not as joint-tenants."(*t*)

"I devise to my two daughters, Jane and Mary, all my right in B. and C. between them."(*u*)

In *Barker v. Giles*, a person devised his lands to be sold for payment of debts and legacies; the surplus of the money arising from the sale to be laid out in lands, and to be settled to the use of his two nephews, Jerome and Robert Barker, and the survivor of them and their heirs, equally to be divided between them, share and share alike. Under this will, it was determined, that the two nephews were joint-tenants for life, and tenants in common of the inheritance. "It is a certain rule," said the Lord Chancellor King, "in the exposition of wills, that every word shall have its effect, and not be rejected, if any construction can possibly be put upon it; and here I think there may; the first part of the devise being to two, and the survivor of them, makes them plainly joint-tenants for life, and, therefore, they shall be so taken; and then, as to the next words, 'and to their heirs, equally to be divided between them, share

(*m*) *Warner v. Hone*, 1 Eq. Cas. Abr. 292.

See also *Stringer v. Phillips*, *ibid*.

(*n*) *Prince v. Heylin*, 1 Atk. 493.

(*o*) *Sheppard v. Gibbons*, 2 Atk. 441.

(*r*) *Rose v. Hill*, 3 Burr. 1881.

(*s*) *Denn v. Gaskin*, Cowp. 657.

(*t*) *Garland v. Thomas*, 1 Bos. & P. N. R. 82.

and share alike,' these are plainly words importing a tenancy in common, [*186] and shall operate accordingly, *so as to make them tenants in common of the inheritance; by which construction of the will every word takes effect." (v) In *Haws v. Haws*, a testator devised to his four children, their heirs and assigns, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, with the benefit of survivorship. By Lord Hardwicke: "The words, 'equally to be divided,' import a tenancy in common in a will, if there are no more words; but here are other expressions, which make it still stronger, 'as tenants in common and not as joint-tenants.' The last words are, 'with benefit of survivorship,' and this creates the difficulty. I am of opinion, that these words are not so strong as to control the preceding words; for to construe them otherwise would be, from doubtful and ambiguous words, to set aside clear and certain expressions. A construction put upon the words by the plaintiff's counsel is, that they refer to a benefit of survivorship to the survivors of the children, if one or more died in the life-time of the testator. But this is too nice a construction; for it is more natural to suppose, that a man intends the children of his children should be provided for than not, and the Court supposes a parent is taking care of the posterity of his children. Nor is it probable that the testator meant survivorship of himself; for a testator very seldom provides for a contingency in his life-time, for, when any happens, he may alter his will if he pleases. Not but if no other reasonable construction can be put upon these words, the Court ought to resort to it, as in the case of *Lord Bindon v. the Earl of Suffolk*, 1 P. W. 96: Devise of a debt to five grand-children, share and share alike, equally to be divided between them; and if any of them die, then to the survivor; [*187] held to be tenants in common; for, by the *words, 'if any of them die, his share shall go to the survivor,' Lord Cowper said, 'it must be intended if any of them should die in the life-time of the testator; for, by that construction, every word of the will would have its effect and operation.' There is, in another part of the will, a plain inference, that the testator meant a survivorship arising among one another, and not a survivorship in the life of the testator. It is in the preceding clause relating to the personal estate, where the same words are used, and the benefit of survivorship given in case any of them died before 21. The four children, who are to take the personal, take too the real estate; and the same words, in the same will, ought to have the same sense. He was here making a provision for the younger children, to take, indeed, as tenants in common, but with the benefit of survivorship. What benefit of survivorship could he intend, but the same as he intended in the survivorship of the testamentary part of his personal estate? I do not doubt but this was his real intention, as he was making a provision for younger children; and, if one of them should die, did not intend any part of it should go away to his eldest son, which would lessen the provision that was clearly intended for the younger children." His Lordship decreed accordingly. (w)

A right of survivorship, it is observable, may consistently be devised with a tenancy in common. A person may devise to two or more persons as tenants in common, with benefit of survivorship. In *Doe v.*

(v) 2 P. W. 280. 9 Mod. 157.

(w) 3 Atk. 524. 1 Ves. 13.

Abey, a testator devised in the words: "I give and devise all, &c., to my three sisters, for and during their joint natural lives, and the natural life of the survivor of them, to take as tenants in common, and not as joint-tenants. And, from and after the determination of their respective estates, then *to (trustees) and their heirs, during the re- [*188] spective lives of my said three sisters, and the life of the survivor of them, upon trust to prevent the contingent estates hereinafter limited from being defeated or destroyed; and, from and after the respective deceases of my said three sisters, and the decease of the survivor of them," [remainders over.] It was determined, on this will, that the three sisters took as tenants in common with benefit of survivorship. "To take as tenants in common," said Lord Ellenborough, "is, correctly speaking, repugnant to taking with benefit of survivorship; but if those words are understood to mean, that they were to enjoy the lands as tenants in common, which they might do with benefit of survivorship, then the only repugnancy seems to be in the words 'and not as joint-tenants.' I would preserve the words 'to take as tenants in common;' the words 'tenants in common' are of flexible meaning, and may be understood, that although they should take by survivorship as joint-tenants, yet the enjoyment was to be regulated amongst them, as tenants in common." And Mr. Justice Bayley: "The fair construction is to treat it as a devise to the sisters as tenants in common, with benefit of survivorship, and thereby give effect to all the words. A tenancy in common, with benefit of survivorship, is a case which may exist, without being a joint-tenancy; because survivorship is not the only characteristic of a joint-tenancy. There is one view in which it might be important to the testator to create a tenancy in common with survivorship, and yet not a joint-tenancy. It might be important in this view, because if it were a joint-tenancy, one joint-tenant might, by means of a lease made during her life, convey to her lessee a title paramount to that of the survivors. It might, therefore, be *the object of the testator to obviate [*189] such a consequence, which would, in effect, defeat his intention."(x)

SECTION XVII.

OF A DEVISE TO AN INFANT WHEN OF AGE.

ON a devise until an infant is of age, and then to the infant in fee; the first devise conveys a chattel(y) interest to the first devisee; and the devise to the infant is, during the minority, a vested, and not a contingent, remainder, and falls into possession when the infant comes of age, or at his death during the minority,(z) unless, notwithstanding his death, the preceding estate is intended to continue to the end of the 21 years.(a)

In Boraston's case, Thomas Boraston had issue, Humphrey, his eldest son, and Henry, his younger son. Henry had issue, Hugh and Philip.

(x) 1 M. & S. 428.

(y) 1 Burr. 234.

(z) *Manfield v. Dugard*, 1 Eq. Cas. Abr.

195. *Lomax v. Holmedon*, 3 P. W. 176.

(a) *Boraston's case*, 3 Co. 19. See 3 P. W. 177.

Thomas Boraston devised in the words:—"I give to Thomas Amery and Amphillis his wife, all that my upper part of my close, called Redding, for eight years next after my decease. And that the said Thomas Amery, nor his assigns, shall, during the said term, fell none of the wood or timber in or upon the said upper part, but shall preserve the woods to the use and behalf of the heir in remainder. And, after the term of the said eight years, the said upper part to remain to my executors, until such time as Hugh Boraston shall accomplish his full age of 21 years, and the mean profits to be employed by my executor towards the performance of [*190] this my last will and testament. And, when the said *Hugh, shall come to his age of 21 years, then I will he shall enjoy the said upper part to him and to his heirs for ever." Hugh Boraston died at the age of nine years. It was contended for the plaintiff in this case, that no remainder was vested in Hugh Boraston, until he attained his age of 21 years; and that in the meantime, the lands descended to the daughters of the eldest son, who were the heirs at law of the devisor; and as Hugh Boraston never reached 21, the land never vested in him, but remained in the heir at law. For the defendant it was argued, that the remainder vested in Hugh presently by the death of the devisor, and by Hugh's death, without issue, the land descended to Philip, his brother; and that although Hugh died before his full age, yet the interest and term of the executors did not cease. The Court resolved, that the executors had a good term for twelve years [the remainder of the 21,] and that it was not determined by the death of the minor. And, farther, "that the case was no other in effect, but that a man devises his lands to his executors (for the payment of his debts,) *until* his son shall, or should have, come to his full age of 21 years, the remainder to his son in fee; for although these are adverbs of time, *when*, &c., *then*, &c., yet they do not amount to make any thing to precede the settling of the remainder, no more than in the common case; a man leases land for life or years, and after the decease of the lessee, or the term ended, the remainder to another, yet it shall remain presently; for when these adverbs refer to a thing, which must of necessity happen, there they make no contingency. And, in the case at bar, certain it is, Hugh would or might have accomplished his age of 21 years, which are, in this case of a will, all one in construction of law. So that these adverbs, *then* and *when*, in our [*191] case *are demonstrations of the time, when the remainder to Hugh shall take effect in possession, as in the said cases of a lease for life, and lease for years, and not when the remainder shall vest." (b)

Boraston's case has been followed on the farther devises in the words:—

"I devise, &c., to my wife, till my son and heir apparent shall attain to his age of 21 years, and when my son shall attain to his age, then to my son and his heirs." (c)

"I devise, &c., to the Rev. Mr. Thomas Hayward and John Bates, and the survivor of them, and the heirs of such survivor, in trust, that they and the survivor of them, his heirs and assigns, shall lay out, employ, and bestow the rents and profits of the said premises for the main-

(b) 3 Co. 19.

(c) *Manfield v. Dugard*, 1 Eq. Cas. Abr. 196.

tenance, education, and bringing up, and putting forth into the world, of Thomas and John Hayward, sons of my sister, Elizabeth Hayward, during their minorities; and when and as they shall respectively attain their ages of 21, then to the use and behoof of the said sons of my sister Hayward, the said Thomas Hayward and John Hayward, and their heirs, equally." (d)

"I devise, &c., to Thomas Lea and Edward Johnston, and their heirs and assigns, to hold to them, and their heirs, until Michael Lea, second son of my nephew Thomas, shall attain the age of 24 years, on condition that they shall, out of the rents and profits, during all that time, keep the buildings in repair. Item, I devise unto Michael Lea, my great nephew, and to his heirs and assigns for ever, when and so soon as he shall attain his age of 24 years, all the said," &c. (e)

"Similar devises will also be found in the cases referred to [*192] in the margin. (f)

SECTION XVIII.

OF DYING WITHOUT ISSUE.

To die without issue appears to have a technical meaning. Popularly, A. dies without issue, if he leaves no issue *at his death*. (g) But, technically, if A. leaves issue at his death, still he dies without issue *whenever* the issue fail. (h)

A common devise is to A. for life, in tail, or in fee; and, farther, to B., when there are no issue living of A. There may be no issue living of A. at A.'s death; or there may be no issue living of A. a century hence. The devise may be to B., if there are no issue of A. living at A.'s death, or whenever there are no issue living of A.

If a person, seised in fee, devises to A.; and, farther, to B., if there are no issue of A. living *at A.'s death*: if the devise is to A. and the heirs of his body, A. will take an estate-tail, and B. a contingent remainder: (i) if the devise is to A. and his heirs, A. will take an estate in fee, and the limitation to B. will be an executory devise. (j)

If a person, seised in fee, devises to A.; and, farther, to *B., [*193] *whenever* there are no issue living of A.; whether the limitation to A. is to A. simply, (k) for life, (l) in tail, (m) or in fee, (n) A. will take an estate-tail, and B. a remainder.

(d) Goodtitle v. Whitby, 1 Burr. 228.

(e) Doe v. Lea, 3 T. R. 41.

(f) Lomax v. Holmedon, 3 P. W. 176. Doe v. Underdown, Willes, 293. Goodright v. Parker, 1 M. & S. 692. Edwards v. Symons, 6 Taunt. 213. Farmer v. Francis, 2 Bing. 151. Doe v. Nicholls, 1 Barn. & C. 336. Waxter v. Hutchinson, ibid. 721. See also Hanson v. Graham, 6 Ves. 239.

(g) 1 P. W. 199, 432. Cowp. 411. 1 Bro. C. C. 190.

(h) 1 Leo. 286. 1 P. W. 483, 666. Cowp. 413.

(i) Butl. Fearn's Conting. Rem. 7th edn., 7 note.

(j) Pells v. Brown, Cro. Jac. 590. Roe v. Jeffery, 7 T. R. 589. Doe v. Wetton, 2 Bos. & P. 324. Doe v. Webber, 1 Barn. & A. 713. Doe v. Frost, 3 Barn. & A. 546.

(k) Lee's case, 1 Leo. 285. Hope v. Taylor, 1 Burr. 268. Willes, 2.

(l) Robinson's case, cited 1 Vent. 230.

(m) Elton v. Eason, 19 Ves. 78.

(n) Brice v. Smith, Willes, 1 Denn v. Shenton, Cowp. 410. Tenny v. Agar, 12 East, 253. Dansey v. Griffiths, 4 M. & S. 61. Romilly, knt. v. James, 6 Taunt. 263.

If a person, seised in fee, devises to A. simply, for life, in tail, or in fee; and, farther, in the words, "and if A. dies without issue," to B.; B., under the technical interpretation of these words, will be entitled to the land, *whenever* the issue of A. are extinct, whether at A.'s death, or at any time afterwards. To confine these words, "if A. dies without issue," to the meaning of dying without leaving issue *at A.'s death*, there must be other words in the will, which express or imply this intention; otherwise, the interpretation of the will will depend on the technical signification of the words. (o) But if there *are* words in the will which prove the testator means dying without leaving issue *at A.'s death*; in this, as in other cases, the testator's own meaning of the words will control their technical signification. (p)

There are many other expressions, it should be observed, which are construed to have the same import as the words, "and if A. dies without issue," and are understood to express the testator's intention to be, to entitle B. to the land *whenever* the issue of A. fail. The particular words in the devises which follow have been construed to have this meaning; and, in consequence, the first devisee has, in each case, been held to take an estate-tail, and the second devisee a remainder:—

[*194] "I devise, &c., to William, my second son; and, if he *depart this world not having issue, then I will that my sons-in-law shall sell my lands." (q)

"I give and bequeath, &c., to my dear children, if I should leave any to survive me; but, in case I should leave no such child or children, nor the issue of such child or children, then I give and bequeath," &c. (r)

"I give and bequeath to my grandson, Samuel Shenton, all, &c.; to hold to the said Samuel Shenton, and the heirs of his body lawfully to be begotten, and their heirs for ever; but, in case the said Samuel Shenton shall die without leaving issue of his body, then I give," &c. (s)

"I devise, &c., to my son John Agar, and his heirs for ever; on this condition only, that he shall yearly, by half-yearly payments, at Michaelmas and Lady-day, pay to my daughter, Elizabeth Agar, the full and just sum of 12*l.* a year, until she shall attain the age of 21 years, and after that age to pay her 300*l.* in lieu thereof, and in full of her portion; and, for default of payment of any part so bequeathed to her, she shall enter into the said nine closes, and shall enjoy them all to her and her heirs for ever in case of non-payment or non-performance as afore limited, but not otherwise. And, in case my said son and daughter both happen to die without leaving any child or issue, lawfully begotten or to be begotten, then and in such case only I give and devise." &c. (t)

"I devise, &c., to (trustees) and their heirs, in trust to apply the rents and profits of my estates and effects for my son during his life; and afterwards for the heirs of his body; if any, and, in default of such issue, then in trust," &c. (u)

[*195] "I devise to my eldest son, Dansey Richard Dansey, *and his heirs for ever, all, &c.; but if it shall so happen that my eldest son, D. R. Dansey, shall die and leave no issue, then I devise," &c. (v)

(o) Cowp. 411. 12 East, 261.

(p) 12 East, 262.

(q) Lee's case, 1 Leo. 285.

(r) Southby v. Stonehouse, 2 Ves. 611.

(s) Denn v. Shenton, Cowp. 410.

(t) Tenny v. Agar, 12 East, 253.

(u) Elton v. Eason, 19 Ves. 73.

(v) Dansey v. Griffiths, 4 M. & S. 61.

"I devise to my brother, H. Smith, all my real estate, subject to the several devises hereinafter expressed. I devise to my brother's son, H. Smith, all my estate in Radnorshire, called the Meadows under Stanmer; to hold to him and his heirs for ever. And, farther, my will is, that in case my brother, and his son, my nephew, shall happen to die, having no issue of either of their bodies, then I devise all my real estate to my nephew, Josias Clerk, and his heirs." (w)

A term of years cannot be entailed, and it is illegal to devise in perpetuity. If, then, a termor for years devises the term to A., simply, and, if A. dies without issue, to B.; (x) or to A. for life, and, if A. dies without issue, to B.; (y) or to A. for life, and afterwards to the heirs of his body; and, if A. dies without issue, to B.; (z) or to A. and the heirs of his body, and, if A. dies without issue, to B.; (a) in either case, under the technical interpretation of the words 'and if A. dies without issue,' the limitation to B. is too remote, and in consequence void, and the land for all the term is the property of A. and his personal representatives. (b)

Neither on a devise to A. by a tenant in fee, nor by *a [*196] termor for years, do the words "and if A. dies without issue," of themselves, imply a dying without leaving issue at A.'s death. (c) But it appears to be a distinction, that if a person, seised in fee, devises to A. for life, in tail, or in fee; and, if A. dies without *leaving* issue, to B.; the word *leave* does not imply a dying without issue living at A.'s death; and, therefore, A. takes an estate-tail, and B. a remainder. But if a termor for years devises to A., and, if A. dies without leaving issue, to B.; the word *leave* does imply a dying without issue living at A.'s death; and, therefore, in this case, the limitation to B. is an executory devise expectant on the death of A. without leaving issue then living. This distinction was made in *Forth v. Chapman*, (d) and is acknowledged in modern cases. (e)

In the devises which follow by termors for years, the failure of issue has been held to be confined to the time of the death of the first devisee. The limitation over, in each case, was, in consequence, not too remote, and the first devisee took the term subject to the executory devise over:—(f)

"I devise, &c., to my son Henry for his life and no longer; and, after his decease, to such of the issue of the said Henry, as Henry by his will shall appoint; and, in case Henry shall die without issue, then I devise," &c. (g)

(w) *Romilly, knt. v. James*, 6 Taunt. 263.

(x) *Burford v. Lee*, 2 Freeman, 210.

(y) *Love v. Windham*, 1 Lev. 290.

(z) *Elton v. Eason*, 19 Ves. 73. *Kinch v. Ward*, 2 Sim. & St. 409.

(a) *Crooke v. Devandes*, 9 Ves. 197.

(b) See also *Beauclerk v. Dormer*, 2 Atk. 308. *Saltern v. Saltern*, 2 Atk. 376. *Chandlees v. Price*, 3 Ves. 99. *Russell's Rep.* 264.

(c) *Beauclerk v. Dormer*, 2 Atk. 308. *Saltern v. Saltern*, *ibid*, 376. *Earl of Staf-*

ford v. Buckley, 2 Ves. 171. *Bigge v. Bensley*, 1 Bro. C. C. 187. *Glover v. Strothoff*, 2 Bro. C. C. 33. *Ibid*, 578. *Everest v. Gell*, 1 Ves. jun. 286. *Chandlees v. Price*, 3 Ves. 99. *Rawlins v. Goldfrap*, 5 Ves. 440.

(d) 1 P. W. 663.

(e) 9 Ves. 204.

(f) See also *Nichols v. Hooper*, 1 P. W. 198. *Pinbury v. Elkin*, *ibid*, 563. *Greene v. Ward*, *Russell*, 263.

(g) *Target v. Gaunt*, 1 P. W. 432.

[*197] "I devise to John Chapman the lease of the ground I *hold of the school of Bangor, for the use of my nephews, William Gore and Walter Gore; and if either of my nephews William or Walter shall depart this life, and leave(*h*) no issue of their respective bodies, then I give," &c.(*i*)

"I devise, &c., to (trustees,) to the use of such children as I shall leave at the time of my death, equally amongst them; and in case any of my said children shall die without leaving any issue, the share of him or her so dying to go to the survivors or survivor of them; and, in case all my said children shall die without leaving any issue, then to the issue of John Hutchinson."(*j*)

"I devise, &c., to my son, George Lyde, for life; and, after his decease, to the children of George, share and share alike; but if George shall die without issue of his body, then to my son Robert Lyde, for life."(*k*)

"I devise, &c., to my grandson, Thomas Biley Peake, son of Daniel and Sarah Peake, and the heirs lawful of him for ever; but in case he should happen to die and leave no lawful heir, then, and in that case, I give the premises, after the death of the said Thomas Biley Peake, to the next eldest son or heir of the said Daniel Peake and Sarah his wife; and soon to the next eldest son or heir, if the last should die without heirs."(*l*)

"I devise, &c., to my son S. Parker, and to the heirs of his body lawfully begotten, and to their heirs and assigns for ever; but in default of such issue, then after his decease to go to my grandson T. Wilkinson, his heirs and assigns for ever."(*m*)

[*198] "I devise, &c., to my grandson John Wright, and to the *heirs of his body lawfully issuing; but in case my grandson dies and leaves no such heirs, then I bequeath the said premises to my grandson John Crosse Crooke, and such his heirs."(*n*)

"I devise, &c., to (trustees) upon trust to pay and apply the sum of 30*l*. for the benefit of my wife during her life, out of the rents and profits, and the residue for the maintenance and benefit of my daughter, Emma Sarah. And after the death of my wife, the whole of the rents, issues, and profits of the said houses and premises shall be the sole property of my said daughter, Emma Sarah, and her children lawfully begotten; and in default of such issue, and in case of her death, the said houses and premises shall become the joint property of my sons, Felix and William Paul, or the survivor of them."(*o*)

SECTION XIX.

OF A DEVISE BY A TENANT *PUR AUTER VIE*.

If a person, seised of lands *pur auter vie*, devises them to A. and his heirs; if, at A.'s death, they descend to the heirs, they will be *special occupants* of the lands. So, if the devise is to A., and the heirs of his

(*h*) See 1 P. W. 666.

(*i*) Forth v. Chapman, 1 P. W. 663.

(*j*) Atkinson v. Hutchinson, 3 P. W. 258.

(*k*) Doe v. Lyde, 1 T. R. 593.

(*l*) Goodtitle v. Pegden, 2 T. R. 720.

(*m*) Wilkinson v. South, 7 T. R. 555.

(*n*) Crooke v. De Vandes, 9 Ves. 197.

(*o*) Gawler v. Cadby, Jacob Rep. 346.

body; if, at A.'s death the lands descend, the issue of A. will be special occupants.(p) If the devise is to A. for life, remainder to B. for life; on the determination of A.'s estate, B. will be a special occupant.(q)

An estate *pur auter vie* may be entailed,(r) in the sense [*199] *(which is the true meaning of the word) that the heirs general are cut off from the line of descent. But an estate-tail of lands held *pur auter vie* is not an entail within the intent of the statute *de donis*.(s) If, therefore, a person, seised of lands *pur auter vie*, devises them to A. and the heirs of his body, A. may cut off the entail without either a fine or a common recovery. He may dispose of the estate *pur auter vie* by any conveyance, as by a covenant to stand seised, a bargain and sale, or a lease and release;(t) or, in equity, even by an agreement to dispose of it, as to sell or settle it.(u) The conveyance, or agreement, will bar the issue of A., and also remainder-men. If, also, the estate *pur auter vie* is held under a lease, and A. surrenders the lease, the issue and remainder-men will be barred by it. And if, on the surrender, A. takes a new lease, this he will be entitled to, independently of the devise of the surrendered lease, and neither the issue of A., nor remainder-men, devisees of the old lease, will have an interest in the renewed one.(v) It farther appears, that A. may bar his issue,(w) and perhaps also remainder-men,(x) by devise. It has been mentioned, that A.'s estate is not an estate-tail within the intent of the statute *de donis*; it may be added, it is not an entail (or fee-conditional) at common law. A. is entitled to dispose of the estate *pur auter vie* before the birth of issue.(y)

SECTION XX.

[*200]

OF A DEVISE BY A MORTGAGEE.

It appears that if a mortgagee for *years*, the mortgage being forfeited, devises in the words "I devise my mortgages to A.," the devise will entitle A. to the money due on the mortgage, and also to the legal estate in the term.(z)

If a mortgagee in *fee*, the mortgage being forfeited, devises simply in the words, "I devise my mortgages to A.," it appears to be clear, that A. will be entitled to the money due on the mortgage;(a) but there seems to be considerable doubt if, in this case, there not being other words in the will to explain the testator's intention, the legal estate in fee of the mortgagee, will, as well as the money, pass under the devise.(b) There

(p) 6 T. R. 292.

(q) 3 P. W. 264. 3 Atk. 376.

(r) 2 Vern. 185.

(s) 2 Vern. 226. 3 P. W. 263. 1 Atk. 525.

(t) 2 Vern. 225. 1 Atk. 525. 2 Atk. 376.

(u) Grey v. Mannock, cited 6 T. R. 292.

(v) Doe v. Luxton, *ibid*, 289.

(w) Wastneys v. Chappell, 1 Bro. P. C. 457, cited 1 Atk. 525.

(x) Baker v. Bayley, 2 Vern. 225. Duke of Grafton v. Harmer, 3 P. W. 266, note

(y) Cooper Rep. 186.

(z) Grey v. Mannock, cited 6 T. R. 292.

(a) See 6 T. R. 293.

(b) Harg. Co. Litt. 20 a (5).

(c) Crips v. Grysil, Cro. Car. 37, *ibid*, 449, 450. 3 Ves. & B. 49. But see 2 Ves. 46.

(d) 2 Ves. 46. Crips v. Grysil, Cro. Car. 37.

(e) Crips v. Grysil, Cro. Car. 37. Wilkinson v. Merryland, *ibid*, 447, 449. 3 Ves. 46. 3 Ves. & B. 49.

is an appearance, that the legal estate in fee may be considered to descend to the testator's heir at law, in trust for the devisee of the money or beneficial interest in the mortgage. (c) In *Crips v. Grysil*, a mortgagee in fee, before forfeiture of the mortgage, devised to Robert Key, "all his goods, monies, bills or bonds, mortgages or specialties for monies;" and made him executor; and, without argument, the opinion of the court of Common Pleas was, "that these words, 'all my mortgages,' made a good [*201] devise of the lands mortgaged." (d) And in *Silberschildt v. Schiott*, on a devise by "mortgagee in fee, after foreclosure of the mortgage, it is stated by Sir William Grant:—"The testator seems not very well to have understood the effect of a foreclosure; and still continues to describe as a mortgage the interest he had. If his interest had been really such, there is no doubt a gift of the money would have carried his interest in the land upon which it was secured." (e) On the other hand, in *Wilkinson v. Merryland*, determined after *Crips v. Grysil*, it appears that a person was seised of land in A., B., and C. in fee. The lands in C. were lands mortgaged to him. After forfeiture of the mortgage, he devised the lands in A. and B., to several persons in fee; and, after several bequests of legacies, added this clause: "All the rest of my goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods, whereof I am possessed, I devise to my wife, after my debts and legacies paid." He also made his wife executrix. On this will, the question came before the court of King's Bench, whether the fee passed to the wife by the words, 'all my estates, mortgages,' &c.; and it was held "that no fee passed to her." (f) This case came again before the Court; "But Jones and myself," says the reporter (Croke,) "continued of our former opinion, that no fee passed. But the greater question would have been, whether an estate for life had passed to the wife if she had been alive; because it is coupled only with personal things, as 'goods, leases, estates, mortgages, debts,' &c., which may be intended, that he meant only but estates for years, or mortgages for years; and so much the rather, by reason of the words, 'whereof I am possessed.' And Berkley, Justice, (who was absent the day before) concurred in opinion; for the heir shall [*202] not be disinherited, nor the fee passed away, without an apparent intent out of the words of the will. And in this case it does not appear that he intended to pass but such things whereof he was possessed, which extends only to things personal or leases, whereof he is *possessed*, and not to freehold, whereof he is said in law to be *seised*. And, peradventure, he was not possessed of this land; for it is not found, that the mortgagee entered and was in possession: and commonly, in mortgages, the mortgagor retains the possession until the mortgagee enters for the forfeiture. Wherefore, it was appointed, that judgment should be entered for the plaintiff. But they agreed, if he had devised, 'all his estate in such land,' or had mentioned that he had such land mortgaged in fee, and devised 'his mortgage,' the fee had passed." (g) In agreement with *Wilkinson v. Merryland* appears to be the opinion of the Master of the Rolls, Sir John Strange, in the *Attorney-General v. Meyrick*; where, on a bequest of money due by mortgage,

(c) *Wilkinson v. Merryland*, Cro. Car. 447, 449, 2 Ves. 46.

(d) Cro. Car. 37.

(e) 3 Ves. & B. 49.

(f) Cro. Car. 447.

(g) Cro. Car. 449.

he stated:—"By a gift of all one's mortgages to A., the whole beneficial right passes to him; and be the legal interest either in the heir or executor, as it is a mortgage in fee or term for years, each will be considered as trustee for A., who will be permitted by the Court to use their names to get the money or make the pledged estate his own by foreclosure."(*h*)

If a mortgagee in *fee*, or for *years*, after forfeiture of the mortgage, devises in the words, "I devise my messuages, tenements, lands, hereditaments, and premises, to A.;" or, "I devise all my estate to A.;" it appears to be now settled, that the mortgaged lands will pass inclusively in the devise, unless an intention not to include them can be *inferred from the context.(*i*) In *Ex parte Morgan*, John [*203] Williams, a mortgagee in fee, devised as follows:—"I give and devise all and singular my messuages, tenements, lands, hereditaments, and premises, and all my real estate, of what nature, kind, or quality soever, and wheresoever the same are situate and being, unto my niece, Ann Williams, daughter of my brother, Edward Williams, to hold to her, her heirs and assigns for ever; subject, nevertheless, and charged and chargeable with the payment of one clear annuity, rent-charge, or sum of 20*l*., to be issuing out of all and singular my said real estates, and payable to my said brother, Edward Williams, by his said daughter, Ann Williams, her heirs and assigns, by yearly payments, for and during the term of his natural life." The testator appointed Ann Williams his executrix; and died seised of several freehold estates. By Lord Eldon, on this will:—"The late cases have taken this turn; that where general words are used, and upon the will the testator makes a disposition inconsistent with the disposition of that which is not his own, you confine the general words. By this will, everything is charged with an annual outgoing of 20*l*., which might last longer than the mortgage. From that circumstance, there is inconsistency enough to show he did not mean to charge this real estate, as real estate, and it is not charged upon his personal estate."(*j*)

*SECTION XXI.

[*204]

OF A DEVISE BY A SURVIVING TRUSTEE.

If a surviving trustee in *fee*, or for *years*, devises in the words, "I devise my messuages, tenements, lands, hereditaments, and premises, to A.;" or, "I devise all my estate to A.;" it appears to be now settled, that the lands he holds in trust will pass inclusively in the devise, unless an intention not to include them can be inferred from the context.(*k*) In *Roe v. Reade*, one P. Rooke devised to G. Reade and his heirs on the following trust:—"That he, the said G. Reade, or his heirs or assigns, do

(*h*) 2 Ves. 46.(*j*) 10 Ves. 101.(*i*) 10 Ves. 103. Butl. Co. Litt. 205, a(*k*) *Roe v. Reade*, 8 T. R. 118. Lord

(1) 5. See 2 Vern. 625. 1 Atk. 605. 2

Braybrooke v. Inskip, 8 Ves. 417. 10 Ves.

Jac. & W. 194. 4 Ves. 149; 8 Ves. 436,

103. Butl. Co. Litt. 205 a (1) 5.

437. *In re Horsfall*, 1 M'Clel. & Y. 292.

and shall sell, give, devise, or otherwise dispose of, all that my said mesuage, &c., unto and amongst his four children, G. G. Reade, W. Reade, B. Reade, and J. Reade, in such manner, and in such shares and proportions, as the said G. Reade shall, by any deed or last will and testament duly executed, &c., give, direct, limit, or appoint the same." G. G. Reade, the eldest son of the devisee G. Reade, died in the life-time of the testator, leaving an only son, G. Reade. After the death of P. Rooke, G. Reade, the devisee, appointed three-fourth parts of the premises to his three surviving children. G. Reade, son of G. G. Reade, attained his age of 21, and died leaving G. Reade, the lessor of the plaintiff, his only son. G. Reade, the devisee and trustee under P. Rooke's will, by will, after devising certain lands in Wiltshire to his son W. Reade in fee, concluded thus:—"and all the rest and residue of my ready money, and securities for money, stocks in the public funds, goods, chattels, real and [*205] personal estate and effects whatsoever *and wheresoever, and of what nature or kind soever, as well copyhold estates as all others, situate in the counties of Wilts and Dorset, or elsewhere in the kingdom of England, after payment of my debts, legacies, and funeral expenses, I give, devise, and bequeath unto my said son, W. Reade, his heirs, executors," &c. On this will of the trustee, the trust estate was, by the context, held not to pass under the residuary clause. "The lessor of the plaintiff, said Lord Kenyon, "claims the disputed fourth part as the heir at law of G. Reade, and he is entitled to it by descent, unless it were given away from him by the residuary clause in G. Reade's will. That clause is relied upon for this purpose by the defendants; and, undoubtedly, the words are sufficiently comprehensive to pass this fourth, if it can be collected from the will, that the deviser intended that it should thereby pass. In *Chester v. Chester*,^(l) it was holden, that a remote reversion passed by a general residuary clause, it appearing to be the testator's intention that it should pass. But all this doctrine was fully considered by this Court, and afterwards in the House of Lords, in the case of *Strong v. Teat*,^(m) where it was determined that the general words in a will may be restrained, in cases where it appears that the deviser did not intend to use them in their general sense. Now, in this case, the trustee (the deviser) had no beneficial interest in himself; he was a mere naked trustee although the use was executed in him; and when he set about to make a disposition of his property by his will, he used general words in the residuary clause, giving all his estates, 'after payment of his debts, legacies, and funeral expenses.' Now these latter govern and restrain the general effect of the former words, and show that he only [*206] meant to give that in which *he had a beneficial interest, and which he had a power of charging with the payment of his own debts. But it is clear that he could not subject the estate in question to his own debts. This satisfies me that he had no idea of disposing of the trust estate; and therefore I think, on the authority of *Strong v. Teat*, that the estate in question did not pass by the residuary clause in this will." Grose, J., said, "I think that the description of the estates in the residuary clause is very important. The deviser had an estate of his own in Wiltshire, and another in Dorsetshire: in the residuary clause, he enumerates these by name; and in the following words 'or elsewhere

(l) 3 P. W. 56.

(m) 2 Burr. 912.

in the kingdom of England' must mean estates *ejusdem generis*, his own estates. And this construction is confirmed by the other words, 'after payment of my debts,' &c., which clearly show that he did not intend to comprehend his trust estate."⁽ⁿ⁾ In *Lord Braybrooke v. Inskip*, it was a question, whether the legal estate passed to Lady Alston, by the will of Sir Rowland Alston, son and heir of the surviving trustee under the will of Owen Thomas Bromsall. Sir Rowland Alston by his will gave and devised all his real estates whatsoever and wheresoever to his wife, Dame Gertrude Alston, her heirs and assigns, for ever; and also gave all his personal estate and effects whatsoever and wheresoever, to his said wife; appointing her, and George Brooks, executors. It being contended that the legal estate did not pass by the will, but descended to the heirs at law of Sir Rowland Alston, and two of his co-heirs being infants, and another a feme-covert, an application was made under the statute 7 Anne, c. 19, for a reference to the Master, to inquire whether the infants were trustees within the act. The Master reporting, that the legal estate did not pass by the will, and that the infants were trustees within the act; on a petition to confirm the report, and that the infants might join in the conveyance, the Master of the Rolls declared his opinion, that the legal estate did pass by the will, and the infants were not trustees within the act; and dismissed the petition. By Lord Eldon: "I am disposed in this case to concur with the opinion of the Master of the Rolls; meaning rather to state my judgment, that the rule is not, that in every case, where general words are used, the property shall or shall not pass; but, that in each case you must look at every part of the will for the intention with regard to such property. I do not know in experience any case, in which the proposition is laid down so strong, one way or the other, as it was laid down in the *Attorney General v. Buller*."^(o) I know no case which states as the rule, that trust estates shall not pass under general words, unless an intention that they should pass appears; and I incline to think they will pass, unless I can collect from expressions in the will, or purposes or objects of the testator, that he did not mean they should pass. In this case, there is no circumstance, except one that I shall observe upon, denoting any special intention. It is the case of a dry trust; all the debts and legacies being long paid. There was therefore a pure legal estate in this testator; nothing remaining to be done but to convey. There is no one circumstance in this will to cut down the general effect upon any notion of intention; unless it can be said that, where he meant to create a trust, namely, as to the personal estate, he joins another person with his wife; giving the real estate to her alone. But that is too thin an evidence of intention to afford much inference. *The result is this: on a will containing words [*207] large enough; and no expression in it authorizing a narrower construction than the general legal construction; nor any such disposition of the estate as is unlikely for a testator to make, of any property not in the strictest sense his; as complicated limitations; nor any purpose at all inconsistent with as probable an intention to vest it in his wife, as devisee, as to let it descend; I know of no case, in which a mere devise in these general terms, without more, where the question of intention cannot be embarrassed by any reasoning upon the purpose, or objects or the person

(n) 8 T. R. 118. .

(o) 5 Ves. 339.

of the devisee, has been held not to pass the trust estate. If there was any such case, I would abide by it; but I do not feel strong enough, upon authority or reasoning, to dissent from the decision of the Master of the Rolls. Lady Alston, therefore, has in her the legal estate."(*p*)

SECTION XXII.

OF A DEVISE BY A DONEE OF A POWER.

UNDER this head will be considered, first, a devise by a donee of a power, having also an estate in fee in the land; and, secondly, a devise by a donee of a power, who has not an estate in fee in the land.

It frequently happens, that a person has an estate in fee in land, and, farther, a power of appointment of the same land. On a will by him, it is often a question if he has intended to devise under the estate, or under the power; in other words, if he has intended to devise, or to appoint.

It is among the resolutions in Sir Edward Clere's case: "If a man [*209] seised of lands in fee, makes a feoffment to *the use of such person and persons, and for such estate and estates, as he shall appoint by his will: by operation of law, the use doth vest in the feoffor, and he is seised of a qualified fee, that is to say, until declaration and limitation be made according to the power. When a man makes a feoffment to the use of his last will, he has the use in the meantime. If, in such case, the feoffor by his will limits estates according to his power reserved to him on the feoffment, there the estates shall take effect by force of the feoffment, and the use is directed by the will; so that in such case the will is but declaratory. But if in such case, the feoffor, by his will in writing, devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will; for the testator had an estate devisable in him, and power also to limit a use, and he had election to pursue which of them he would; and when he devised the land itself, without any reference to his authority or power, he declared his intent to devise an estate as owner of the land by his will, and not to limit a use according to his authority."(*q*) To the same effect is the language of the Lord Chief Justice Hobart, who, on the authority of Sir E. Clere's case, has said: "If an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the authority." "Where interest and authority meet, if the party declare clearly, that his will is, that this act shall take effect by his authority or power, there it shall prevail against the interest."(*r*) The Lord Chief Justice Holt, also, has said: "When one has an authority, and does an act which can be good no other way but by virtue and in pursuance of that authority, *it shall rather be understood to [*210] have been by force of his authority than void; although in doing the act he takes no notice of his authority. But where one has an

(*p*) 8 Ves. 417.

(*q*) 6 Co. 18. Sir E. Clere v. Parker,

Cro. Eliz. 877. S. C. See also Browne v. Taylor, Cro. Car. 38.

(*r*) Hob. 159, 160.

interest and an authority together, and he does an act generally, it shall be construed in relation to his interest, and not to his authority. And this is the very point of Clere's case. He was seised in fee of three acres of land *in capite* [by knight service,] of equal value, and made a feoffment in fee of two of them, to the use of his wife for life, for her jointure; and of the third acre to the use of such person and persons, and of such estate and estates, as he should devise by his last will; and after by his will devises the said third acre, without any notice taken of his power reserved upon the feoffment. Now, if they had been three acres of land in socage, and he had made such a feoffment, and after devised the third acre without reference to his power, it had passed by the will; because then it might either pass, by virtue of his interest, by the will, or his authority by the feoffment; but being *capite* [knight-service] lands, which could not pass but by the authority, because he had passed two parts by act executed,^(s) this devise was construed to be an execution of his authority, because otherwise the devise had been to no purpose."^(t) These principles are adopted in the exposition of wills at the present day."^(u)

If, then, a person, who has an estate in fee in land, and also a power of appointment of the land, devises, by name, the particular lands; or devises in any general terms, as in the words, 'I devise all my messuages, tenements, lands, hereditaments and premises to A.;' the devise is interpreted to be a devise, and not an appointment, unless, by the context, it appears to be the intention of the testator to *appoint [*211] under the power.^(v) The question if a devise is to be considered as a devise, or as an appointment, is often, it may be observed, of importance to remainder-men, who by means of the appointment may be shut out and deprived of the estate in remainder.

In *Powell v. Loxdale*, Martha Powell devised all her messuage, tenements, and farm, with the lands, hereditaments, and appurtenants thereunto belonging, in Westley in the county of Salop, and all other the messuages, lands, tenements, and hereditaments that she should be seised or possessed of, unto her brother John Powell, and the heirs of his body; and, for default of such issue, to such uses, &c., as he the said John Powell, by any deed or writing, or by his last will and testament, duly executed in the presence of three or more credible witnesses, should appoint the same; and, in default of such appointment, she devised the same to John Kynaston Powell, and the heirs of his body; and, in default of such issue, to his brother, Edward Kynaston, and the heirs of his body; and, in default of such issue, to the right heirs of the said John Powell. John Powell had in the life-time of the testatrix made his will, whereby he devised all his manor of Worthen in the county of Salop, and all his lands and premises situate in the parish of Worthen, and elsewhere, in the county of Salop [to various uses.] When, after the death and under the will of Martha Powell, John Powell became seised of the estate and premises at Westley, he published a codicil to his will in these words: "Whereas I have in my last will devised all that my manor of Worthen, in the county of Salop, and hereditaments situate in the parish of Worthen, and elsewhere, in the said county (after several estates for

(s) See Co. Litt. 111 b.

(t) 12 Mod. 469.

(u) 5 Barn. & C. 730.

(v) 6 Co. 18. *Browne v. Taylor*, Cro. Car. 38. *Powell v. Loxdale*, 2 Barn. & A. 291.



[*212] life, and in tail, therein mentioned are determined) *to my right heirs. Now, I do hereby revoke and make void the said gift and devise to my right heirs, and I do, in lieu thereof, give and devise the ultimate reversion in fee of all my said estates in the parishes of Worthen, Westbury, and Cherbury, in the said county of Salop, to my nephew, John Kynaston Powell, named in my will, and his heirs. And I do hereby confirm my said will, and all matters, in every other respect." John Powell had not any estate in the parish of Westbury, except the said farm and premises at Westley, devised to him by the will of Martha Powell, which is situate in the parish of Westbury; and he died without issue.

On this case, the court of King's Bench returned a certificate to the court of Chancery, that the power of appointment given to John Powell, by the will of Martha Powell, was not well executed by the codicil to his will; and that John Kynaston Powell took an estate-tail to him, and to the heirs of his body, in the Westley estate.(w)

If a person who has a power of appointment of land, but has not an estate in fee in it, devises, by name, the particular lands, the devise will be considered an appointment, although the power is not referred to in the will.

In *Morgan v. Surman*, a testator devised all that his messuage, or malt-house, and garden, in the parish of Upton Snodsbury; likewise, all that house, with the garden and orchard thereto adjoining, known by the name of the Red Lion, in the parish aforesaid, to his wife, Eleanor Surman, for her natural life. All the residue of his real and personal estate whatsoever, whereof he had not by that his will disposed, he gave to his wife, for her to receive the rents and profits thereof for her own use, and [*213] to *maintain her children, during her natural life. And, after her decease, he gave and bequeathed the same to his children, to be parted among them as she should think proper. Eleanor Surman, the widow, devised to her two youngest sons, James and Francis, all that her freehold messuage, tenements, and premises, in which she then lived, together with the malt-house, all which premises were then in her occupation, and known by the sign of the Red Lion, at Upton Snodsbury. This devise the court of Common Pleas held to be a good appointment under the power. "It has been said," said Sir James Mansfield, "that this is not a good execution of the power, because the testatrix disposes of the property as her own. It is true, that where a person, having an interest and a power, does not refer to the power, it shall be held that he means only to dispose of his interest: but where A. is seised of an estate, with a power for B. to appoint; there B., having no estate, his act shall necessarily be inferred to be done in execution of the power. In a case where a woman devised her real estate, having none, but a power to appoint a real estate of her husband's, Lord Loughborough held it was a good execution of her power. The testatrix [in the present case,] then, taking as she did only a life interest in the real estate, certainly had only a power over the reversion, and not an interest in it. And, therefore, although she uses terms of devise, it is plain that she meant to execute the power."(x)

(w) 2 Barn. & A. 291.

(x) 1 Taunt. 289.



If a person, who has a power of appointment of land, but has not an estate in fee in it, devises in any general terms; as in the words, I devise all my messuages, tenements, lands, hereditaments, and premises to A.; the devise is interpreted to be a devise, and not an appointment, *unless, by the context or collateral evidence, it appears to be the intention of the testator to appoint under the power. [*214]

A donee of a power, not having an estate in fee in the land, has been held to devise, and not to appoint, in the following cases:—

Roe v. Reade, the particulars of which case have been before stated in the present chapter.(y) In *Ex parte Caswall*, Sir George Caswall surrendered a copyhold estate at Woodford, in Essex, to trustees, to the use of his wife for life; and, after her death, to pay the rents and profits to all his children, equally; and then in trust to such use or uses as Sir George should, by deed or will, appoint; and, for want of appointment, then to his son, John Caswall, and his heirs. Sir George Caswall made a will, in which was the following clause: "As to all the rest, residue, and remainder of my effects, real and personal, of what nature, kind, or quality soever, I give to my son, George Caswall." By Lord Hardwicke: "The question is, whether this be a good execution of the power. As I am at present advised, I am of opinion it is not. The material thing is the limitation over of the copyhold in the surrender. What is the effect of that? Why, there is an estate actually vested in John Caswall, and nothing but an appointment executed could divest it out of him; and this would have been the construction if it had been a legal estate; and although it is a trust estate, yet in this Court it ought to be considered and construed in the same manner; and, therefore, is no more than an estate for life to Sir George Caswall, remainder in fee to John Caswall, subject to be defeated on a proper appointment by Sir George Caswall. Sir George Caswall had other lands, by which the devise to George Caswall might *be satisfied. Here is nothing that is at all descriptive of the thing which Sir George Caswall had [*215] a power to dispose of, but what is applicable to other estates of which Sir George was seised, and of which he could equally dispose." (z) In *Doe v. Bird*, it appears that on the marriage of the defendant's father, a settlement was made, by which an estate was settled, after the father's life, to the use of such child or children of the marriage, and for such estates, &c., as the father by his will should appoint; and, in default of appointment, to be divided amongst all the children, as tenants in common. The father died, having made a will, in which, by a residuary clause, he devised all the rest, residue, and remainder of his messuages, lands, &c., and personal estate, &c., after payment of his debts, legacies, and funeral expenses, to his son John Bird, the defendant. The testator had other lands besides the settled lands; and the question was, whether the residuary clause passed the settled lands, as well as the other lands. The court of King's Bench was of opinion, that the power was not executed by the will. "There is nothing in it," it was said, "referring, in any manner, to the power, nor from whence his intention to execute it could be inferred: and the charge of debts and funeral expenses on the lands, &c., devised shewed his intention to pass such lands only as were subject to those charges." (a) In *Coates v. King*, decided

(y) Section xxi.

(z) 1 Atk. 569.
3 B 2

(a) 11 East, 49.



in 1821 before the Privy Council, Alexander Coates divided, by will, his real property in Antigua, among his three sons, with power to one of them to dispose, by will, of his share. The son, being possessed of considerable real and personal estates in Antigua, independant of that given by his father's will, devised in these terms, "All my real estates in Antigua, and all other my real estate, whatsoever and wheresoever;"

[*216] and it *was held that the will did not pass that property, over which he had the power. (b) Denn v. Roake was an ejectment for lands in the county of Surrey. T. Scott, and Sarah his wife, and Henry Roake, and Elizabeth his wife, by lease and release conveyed the premises in question, to one Hill, for the purpose of suffering a common recovery. And it was thereby declared, that the recovery should enure, as to one undivided moiety of the premises, to the use of T. Scott for life; remainder to the use of Sarah Scott for life; remainder to the use of such person and persons, and for such estate and estates, as the said Sarah Scott should, by any deed or writing, or by her last will and testament, from time to time, direct, limit, or appoint; and, for want of such appointment, to the use of all the children of T. Scott, and Sarah his wife, as tenants in common in tail; and, for default of such issue, to the use of Elizabeth Roake for life; remainder to her children as tenants in common in tail; and, for default of such issue, to the use of T. Scott in fee. And there were corresponding limitations, as to the moiety of which Henry Roake, and Elizabeth his wife, were seised. A recovery was accordingly suffered. T. Scott died without issue, leaving Sarah his wife him surviving. Sarah Scott afterwards intermarried with John Trymmer, who died, leaving his wife him surviving. Elizabeth Roake died, leaving Henry Roake her husband, and John Roake, her son and only child, her surviving, and without having made any appointment. By lease and release (the release reciting a contract between Sarah Trymmer and John Roake, for the purchase of his moiety of the premises, subject to the life-estate of his father,) H. Roake, and J. Roake, conveyed the premises for the purpose of suffering a common recovery to the use of H. Roake for life; remainder to S. Trymmer in fee.

[*217] *Sarah Trymmer afterwards made her will, and devised in the words: "I hereby give and devise all my freehold estates in the city of London, and county of Surrey, or elsewhere, to my nephew John Roake for his life, on condition that out of the rents thereof he do from time to time keep such estates in proper and tenantable repair; and, on the decease of my said nephew J. Roake, I devise all my said estates (subject to and chargeable with the payment of 30*l.* a year to Ann, the wife of the said J. Roake, for her life,) to and amongst his children, equally at the age of 21, and their heirs, as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs, at his or her age of 21." And, for default of issue of J. Roake, to certain other persons in the will mentioned. S. Trymmer had not, at the time of making her will, or at the time of her death, any other freehold lands in the county of Surrey, than those mentioned in the declaration. On this case, the court of King's Bench, in error from the court of Common Pleas, (c) and reversing the judgment below, held that the will of Sarah Trymmer, did not operate as an execution of her power

(b) Cited 5 Barn. & C. 726.

(c) Doe v. Roake, 2 Bingh. 497.

of appointment, and passed that moiety only of the premises of which the testatrix was seised in fee.^(d) An important part of the judgment, which was delivered by the Lord Chief Justice Abbott, appears to be, the consideration of the Court, that although it could be inferred that the testatrix meant to give the entirety of the lands in Surrey, still it will not necessarily follow that she intended to execute her power. This part of the judgment is as follows: "The question then is, whether it can be safely and clearly inferred, that the testatrix intended to execute her power. Now it appears by the will that the testatrix had estates in London, or at least supposed she *had, and made her will upon that supposition. And we see nothing repugnant to reason, [*218] or to the ordinary sentiments and intentions of mankind, in supposing that a person having estates in London, and an undivided moiety only of estates in Surrey, might make a will containing such an injunction as the present [to keep the estates in repair,] leaving that injunction to take effect as far as by law it could. And even if it should be inferred from this part of the will that the testatrix meant thereby to give the entirety of the lands in Surrey, still it will not necessarily follow that she intended to execute her power, and this for the reason hereafter mentioned. So if the extrinsic facts should lead to an inference that the testatrix cannot have intended to make a strict settlement of the purchased moiety upon the family of her sister, and leave that which was originally her own unsettled and undisposed of; still, in our opinion, it will not necessarily follow that she intended to execute her power. It may be that she intended the will to work by her interest in the tenements. It may have happened that she had entirely forgotten, the settlement, and supposed at the making of her will that she was then seised of the entirety of the estates in fee, as but for that settlement she would have been. The settlement was made in the life of her first husband, 33 years before the date of her will. The only fact upon the special verdict, shewing that this settlement was ever thought of in the interval, is the release under which she purchased her sister's moiety in 1775, by which that moiety was conveyed for the purpose of suffering a recovery. This took place eight years before the date of her will, and no recovery was suffered till after her death, although she lived eleven years, and must have been in possession of this moiety for nine years; the tenant for life, her sister's husband, having died in 1775. It appears to us to be, at least, as probable that she had forgotten the *settlement, and intended the will to work by an interest, as that she intended [*219] to execute the power contained in the settlement; and even more probable, because the language of the will is exactly such as would be used by a person who at the time supposed herself to have an estate in fee in the entirety of the tenements, and not such as would be used by a person who was conscious that she had a power only over one moiety, and a seisin in fee of the other. Although, therefore, we may think the testatrix intended that the entirety should go in strict settlement on the family of her sister, yet we think it is possible to suppose that the testatrix had no intention to execute the power. And if the intention to execute the power be doubtful, the will cannot, in our opinion, be deemed to be an execution of it."^(e) The point determined in Sir Edward

(d) 5 Barn. & C. 720.

(e) 5 Barn. & C. 783.

Clere's case being, that if a person, who has a power of appointment, devises land without reference to the power; if the devise will be void unless it enures as a limitation of a use, the devise shall operate not as a devise but as an appointment; it is respectfully proposed that, if from the will in *Denn v. Roake*, and collateral evidence, it can be inferred the testatrix supposed herself seised in fee of *both* moieties of the estate; and, farther, it can be collected, that she intended to dispose of the *entirely* by her will; the devise of this testatrix might, by the same benignity(*f*) of the law which determined the case of Sir Edward Clere, operate as an appointment, although the testatrix, mistaking her interest in the land, intended to devise. In Sir Edward Clere's case, the testator, in ignorance of the law, intended to dispose of the acre in question by devise, which, however, by the Statute of Wills, he was not entitled [*220] to do. The will, therefore, in that case, notwithstanding *the testator's intention to devise, was construed to be a limitation of a use under the feoffment. If, then, in *Denn v. Roake*, it can be collected, that the testatrix intended to dispose of both moieties of the land, but, in ignorance of her power of appointment, intended to dispose of them by devise, would it not be in agreement with Sir Edward Clere's case, to determine the intended devise of the moiety in question, to be an appointment under the power in the settlement?

A person having a power of appointment, but not an estate in fee in the land, has been held to appoint, and not to devise, in cases where neither the particular lands subject to the power were mentioned, nor the power referred to, on the collateral evidence that the testator had no other lands to satisfy the words of the will.

In *Standen v. Standen* Charles Millar directed his real estate to be sold; and gave the money arising from the sale, in trust for his wife for life; and, after her decease, as to one moiety, for such person or persons as she should, by any deed or writing, or by will, with two or more witnesses, appoint; and for want of appointment, then over. The real estate was not sold. The testator's widow received the rents and profits for her life; and by her will disposed of the residue of her property, in the words;—"All the rest, residue, and remainder of my estate and effects, of what nature or kind soever, and whether real or personal, which I shall be possessed of, interested in, or entitled to, at the time of my decease, subject to, and after payment of, all my just debts, funeral expenses, and specific legacies, I give to my friend, Samuel Howard, for his own use and benefit." The will was attested by three witnesses. The testatrix had no other real estate than that directed by her husband's will to be sold; and *Lord Loughborough held her will to [*221] be an appointment. "Take it," he said, "according to the strict technical rule in Sir Edward Clere's case, that a general disposition will not dispose of what the party has only a power to dispose of, unless it is necessary to satisfy the words of the disposition. Mrs. Millar had no other real estate. I am bound to satisfy all these words upon the technical rule. I can satisfy them no other way."(*g*) *Jones v. Curry* is an important case on this subject; the general words in the will of a donee of a power, "All my estate and effects, of whatever denomina-

(*f*) Hob. 160.

(*g*) 2 Ves. jan. 589.



tion," being there held to be satisfied by the *personal* property of the testatrix. It appears that one William Browne devised to trustees a moiety of certain freehold hereditaments, and he directed them to pay the rents to Isabella Common for her life; and, after her decease, to convey, assign, transfer, &c., the premises equally amongst her children; and, in default of such children, he directed that his said freehold premises should go to such person or persons to whom she should by her last will and testament give, devise, and bequeath the same. Isabella Common died without issue. By her will, executed and attested so as to pass real estates, she devised:—"I give and bequeath unto my father and mother, Thomas and Ann, all my estate and effects, of whatever denomination." "The question," said the Master of the Rolls, Sir Thomas Plumer, "is, whether so far as the real estate is concerned, an intention to exercise her power can be collected from the will, and from the extrinsic evidence, to which, on the subject of realty, the Court is permitted to resort. On that point, there is a shade of novelty in this case; but, notwithstanding an anxiety to support the will, I should not feel justified in pronouncing a judicial opinion that the testatrix designed to pass this real property. The case of *Standen v. Standen* has established, that, with regard to real estate, the Court may examine whether the circumstances of the testator's property are such as to give effect to the will; and if this will had contained an unequivocal devise of realty, the Court, under the authority of that decision, must, in order to give operation to an instrument, which would otherwise be inoperative, have resorted to the fund, the subject of the power. But this will contains no words which will be without operation unless referred to the power. Although the testatrix had no real estate, she might have personal property of various descriptions, and the terms would be satisfied by passing that." (A) In *Lewis v. Lewellyn*, certain freehold and copyhold estates were limited, in a marriage settlement, to the use of Morgan Lewellyn for life, remainder to the use of Margaret Williams for life, remainder to the use of such person or persons, and for such estate and estates, and for such trusts, intents, and purposes, and charged and chargeable in such manner and form, as the said Morgan Lewellyn, by any deed or deeds, &c., or by his last will and testament, should direct, limit, or appoint. Morgan Lewellyn afterwards, by his will, executed to pass freehold estates, directed that all his just debts should be paid, as soon as conveniently might be after his decease, and charged all his freehold, copyhold, and leasehold estates thereafter mentioned, with the payment thereof; and, subject thereto, he devised and bequeathed all his real and personal estates to his brother, Charles Lewellyn. The testator had no other copyhold estates except those which were comprised in the settlement; but he had other freehold estates. On a bill filed by the creditors, the will was held [*223] to be an execution of the power as to the copyhold estates, but not as to the freehold estates subject to the power. By Best, Justice, for the Master of the Rolls: "The question in this case is; whether the clause cannot be divided, and considered as operating in one sense with respect to the copyhold, and in another with respect to the freehold. If it can, and the case of *Standen v. Standen* is

(A) 1 Swanst. 66.

rightly decided, I think it applies strictly to this case. The will does not refer to the power; but the question is, whether it does not refer to the estate. It refers to the estate in clear and unequivocal terms; and as the rule is, that all the words of a will, should, if possible, have effect; and these words with respect to copyholds cannot be satisfied by any thing short of considering them an execution of the power, *ut res magis valeat quam pereat*, they should be so construed. That is the general principle of *Standen v. Standen*; and we must look only to the general principle, for it is impossible to find two cases precisely alike. The principle is, that where there is nothing for the will to operate upon, but with reference to the power, it must operate as an execution of the power. For these reasons, I am of opinion, that the will is an execution of the power as to the copyholds.”⁽ⁱ⁾

[*224] The cases cited in the margin^(j) are applicable to the subject *of the present section. They have been determined on questions of appointments by will of *personal* property.

SECTION XXIII.

OF A DEVISE TO EXECUTORS TO PAY DEBTS.

ON a devise to executors for the payment of debts, and until the debts are paid, the executors take a chattel estate in the lands, and not a freehold estate, nor a term of years.

In Sir William Cordell's case, Sir William Cordell, Master of the Rolls, devised his manor of Melford, &c., in the county of Suffolk, to his executors, for the payment of his debts, and until his debts should be paid; remainder to Edward, his brother, &c. After the testator's death, the debts were paid, and his [Edward's] wife demanded dower; and it became a question what interest or estate the executors had; for if they had a freehold, then the wife should not have dower; and if they had but a chattel, determinable on the payment of the debts, then she should be endowed: and it was resolved “that the executors had but a chattel, and no freehold; for if they should have a freehold for their lives, then their estate would determine by their death, and not go to the executors of the executors, and so the debts would remain unpaid: but the law adjudges it a particular interest in the land, which shall go to the executors of the executors, as assets for payment of the debts.”^(k)

(i) Turn. Rep. 104.

(j) Probert v. Morgan, 1 Atk. 440. Molton v. Hutchinson, *ibid*, 558. Maddison v. Andrew, 1 Ves. 58. Andrews v. Emmett, 2 Bro. C. C. 297. Buckland v. Barton, 2 H. Bl. 136. Hales v. Margerum, 8 Ves. 299. Langham v. Nenny, *ibid*, 467. Roach v. Haynes, 6 Ves. 153; and 8 Ves. 584. Nannock v. Horton, 7 Ves.

391. Bennett v. Aburrow, 8 Ves. 609. Bradley v. Westcott, 13 Ves. 445. Sloane v. Cadogan, Sugd. Vend. & P. 6th edit. Appendix, No. xxiv. Jones v. Tucker, 2 Mer. 533.

(k) Cited 8 Co. 96. Cordell's case, Cro. Eliz. 316, S. C.; Guavarr's case, cited 8 Co. 96. See also Co. Litt. 42 a.

*A testator frequently wills his debts to be paid by his executors, by a sale of his land. In these cases, it sometimes [*225] becomes a question, if the testator has intended to devise the land, with the legal estate in it, to the executors; or, he has intended to give to them only a power to sell, and, consequently, supposing the testator to be seised in fee, to leave, until the sale, the legal estate in fee in the heir at law.

There is a distinction between a devise in the words, I devise my lands to my executors to sell, and a devise in the words, I devise (or will(*l*)) that my executors shall sell my lands, or, I devise that my lands shall be sold by my executors, or, I devise my lands to be sold by my executors. Of the two devises, the former appears to be understood to express, that the testator intends to give the land, and the legal estate in it, to the executors; the latter, that he intends to give the executors but a power to sell. It is stated in the Year Books:—"If a man devises his land to his executors to sell, the heir cannot enter (*medler*); but if he devises his land to be sold by his executors, there the heir may enter, and take the profits until the executors have sold, and, after the sale, the purchaser may enter on the heir."*(m)* "If a man devises his land to be sold by his executors, and dies, and his heir enters, and dies seised, and his heir enters by descent, yet the executors may sell the land, according to the will of the devisor."*(n)* "If a man devises his land to be sold by his executors, and dies, the heir enters, and afterwards is disseised, yet the executors may sell, and the purchaser may enter. The same law, if the heir suffers a recovery, or levies a fine."*(o)* It is likewise said by Littleton: "Also a man may devise by his testament, that his executors may alien and sell the tenements that he hath in fee-simple, for a certain sum to distribute for his soul. In [*226] this case, although the devisor die seised of the tenements, and the tenements descend unto his heir, yet the executors, after the death of the testator, may sell the tenements so devised to them, and put out the heir, and thereof make a feoffment, alienation, and estate by deed, or without deed, to them to whom the sale is made. And so may ye here see a case, where a man may make a lawful estate, and yet he hath nought in the tenements at the time of the estate made."*(p)* It is also stated by Perkins: "If a man, seised of lands in fee, willeth by his testament, that his executors shall sell the same land, and distribute the profits coming thereof for his soul, and the devisor dieth; now the inheritance shall descend unto the heir, and shall continue in him until they, namely, the executors, sell, &c., and then the executors may enter, &c., and thereof enfeof the vendee according to the sale. But if lands devisable are devised unto the executors for to sell, &c.; in this case, the executors, after the death of the devisor, may enter into the lands, &c., because they were devised unto them."*(q)* In *Houell v. Barnes*, a person, seised of land in fee, devised it to his wife for her life; and after her death, ordered the same to be sold by his executors. On this will, the court of King's Bench held, that the executors had not any interest by this devise, but only an authority.*(r)* In *Lancaster v. Thornton*, a person being seised

(*l*) 2 Burr. 1031.

(*m*) Bro. Abr. Devise, 5.

(*n*) Ibid, 32.

(*o*) Ibid, 36.

(*p*) Litt. s. 169. See Co. Litt. 112 b, and 181 b.

(*q*) Perk. 541, 542.

(*r*) Cro. Car. 382.

in fee of land, and possessed of other lands for a term of years, devised as follows:—"I do hereby charge, and make chargeable, all and every my lands, and inheritance, and leasehold, with the payment of my debts, funeral expenses, and legacies; and, for more speedy raising money for [*227] payment of them, I devise to George, Edmund, and *Dorothy Lancaster, their heirs, executors, and administrators [the leasehold premises,] for all the residue of the term therein to come, &c.; upon trust to sell the same, &c. But in case the money arising from the sale of the leasehold estates shall not be sufficient to pay and discharge all my debts, legacies, and funeral expenses, then I devise, that my said two sons and daughter shall and may absolutely sell, mortgage, or otherwise dispose of my freehold estate, for the payment of such of my said debts, legacies, and funeral expenses, as my said leasehold estate shall not be sufficient to pay and discharge." The testator appointed his sons Edmund and George, and his daughter Dorothy, his executors. It was held, that no estate in the freehold lands passed to the executors, but only a power to sell. "Here are no words," said Lord Mansfield, "by which the [freehold] estate is devised to the executors. Therefore, if it be construed, that there is a devise to them, it must be raised by implication. But, by the frame of the will, it is, plain that the testator did not so intend; for he shews, by the expressions he has used, that he knew the distinction between a devise of an estate to them, and giving them only a power to sell. As to the term, 'devise,' the expression 'I devise' is here synonymous to saying 'I will,' or 'my mind is.'"(s)

Sir Edward Coke has considered a devise in the words, I devise my lands to be sold by my executors, to be all one, with a devise in the words, I devise my lands to my executors to be sold. He says, "In this section [Litt. s. 383] is implied a diversity, viz. when a man deviseth that his executors shall sell the land, there the lands descend, in the meantime, to the heir; and, until the sale be made, the heir may enter, and take the profits. But when the land is devised to his executors to [*228] be sold, there the devise *taketh away the descent, and vesteth the estate of the land in the executor, and he may enter and take the profits, and make sale according to the devise. And here it appeareth, by our author, that when a man deviseth his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold. And the reason is, because he deviseth the tenements, whereby he breaks the descent."(t) It is much, however, to be doubted, if the section Sir Edward Coke refers to in Littleton, authorises the opinion he has formed from it; which opinion, moreover, appears to be in terms opposed by the passage in the Year Books, which has been transcribed from Brook's Abridgment, Devise, 5. There is reason to think that, at the present day, the two devises may be considered to be different; that the latter will pass an estate to the executors, the former only a power.(u)

Personal property is, at law and in equity, the first fund for the payment of a testator's debts, unless an intention is discovered in the will to charge them first on the real estate. A testator may, if he pleases,

(s) 2 Burr. 1027.
(t) Co. Litt. 236 a.

(u) See Co. Litt. 236 a, Lord Nott. note (1), & Sugd. Powers, 3d edit. 111.

charge his real estate alone with the payment of his debts; and if, the whole will taken together, this intention can be collected, the personal property of the testator will be exempted from the payment of them, until the real estate, supposing it insufficient, is exhausted.(v)

On this subject there is an elaborate judgment of Lord Eldon, in *Bootle v. Blundell*.—

“The question,” said his Lordship, “which the Court is now called upon to determine, is, whether, according to the true intent and meaning of this will, collected from the *settled principles of the Court, and the rules of law, the personal estate of the testa- [*229] tor is to be considered as exempt from the payment of his debts.

“In order to determine what are those principles, and those rules, the several cases on this subject have been referred to in the course of the argument; and, on the part of those who contended that the personal estate is not exempted, I am pressed to consider this to be the rule of interpretation; namely, that the intention of the testator to exempt must be manifested in such a manner, as that persons out of Court, on reading his will, cannot fail to agree that such was his intention.

“Upon looking through the several cases which have been decided during the period of more than a century past, I think I should have been authorised to say, at the commencement of that period, that, if such a rule were laid down, there could never, in all human probability, be any decision upon a will furnishing a solution of this question; and now, at the close of it, I think I am authorised to say, that that which it was then probable would be the fact, is the fact; for on a comparison of all the cases which have arisen, it is scarcely possible to find any two in which the Court altogether agrees with itself; there being scarcely a single circumstance that is considered in one case as a ground of inference in favour of the intention, but it is considered, in other cases, as against the same inference; and I can find no rule deducible from all that has been said on the subject, but this (which appears to be a rule supported by all the cases taken together,) namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the will that which is sometimes denominated “evident demonstration,” sometimes “plain intention,” and “necessary implication,” to operate that exemption.

*“Thus much can be collected from the cases; but when you proceed farther, and inquire what it is that constitutes [*230] this “evident demonstration,” “plain intention,” and “necessary implication,” it does appear to me that Lord Alvanley is right when he says, You are not to rest on conjecture, but the mind of the judge must be convinced, that he is deciding according to what the testator intended. The expression “necessary implication,” is frequently applied to cases between a devisee and heir at law; and yet there is hardly a case decided against an heir at law, where the implication, upon which it was so decided, was of absolute necessity. It is but a loose way of defining this expression, to say that the intention must be so probable that the judge cannot suppose the contrary; and it seems strange to lay down as a rule that express words shall not be required, but yet that there must be ex-

(v) *Bootle v. Blundell*, 1 Mer. 193. 1 *Swanet*, 26. *Greene v. Greene*, 4 Mad. 148.

Michell v. Michell, 5 Mad. 69.

pressions tantamount to express words. I take it that this is what will be found to be the result of all the cases: that the judge is in every instance to look at the whole of the will together, and then ask himself whether he is convinced that it was the testator's intention to exempt his personal estate. Many rules are clear and positive. First, it is certain that in equity, as well as at law, the personal estate is first liable; and that the amount of the personal estate, whatever it may be, makes no difference in the case. I take it to be certain, also, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts; that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged. Then, on the question whether the personal estate is discharged or not, I apprehend it will be found that the very same circumstances have, in the minds of different judges, led to different conclusions. And this is the result to be *drawn from the most [*231] diligent comparison of all the cases." His Lordship then observes on the cases in the margin; (w) and proceeds: "Then it comes to this,—upon each particular case, as it arises, the question will be, does there appear, from the whole testamentary disposition taken together, an intention on the part of the testator so expressed, as to convince a judicial mind that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal? For, it is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided." (x)

SECTION XXIV.

OF A DEVISE, AND A TRUST IN THE DEVISEE TO DEVISE.

LAND is often devised to a person who is intended by the testator to have the enjoyment of the property for his life; but, by the will, he is entrusted by a desire, (y) request, (z) hope, (a) or confidence, (b) of the testator, to devise the land, at his death, to the parties the testator names. In these cases, farther than his own life estate, the devisee is construed to be a trustee for the devisees over. Yet it appears a trust will not be considered to be created by a will of this description, if either, in consideration of *law, the parties to be the devisees over are too [*232] indefinitely named by the testator; or, secondly, the devisee is not unauthorised to dispose of the property, if he pleases, in his lifetime. It farther appears, that words merely of *advice or recommendation* to a devisee, to leave the land, at his death, to particular persons, are not considered to be sufficient to create a trust in the devisee to devise to them.

- (w) Lord Inchiquin v. French, Amb. 33; 1 Will. 83; 1 Cox Ch. C. 1. Stapleton v. Colville, Forr. 202. Walker v. Jackson, 3 Atk. 624. Duke of Ancaster v. Mayer, 1 Bro. C. C. 454. Stephenson v. Heathcote, cited 1 Bro. C. C. 458; reported 1 Eden, 38. Tait v. Lord Northwick, 4 Ves. 816. Burton v. Knowlton, 3 Ves. 107. Brummel v. Prothero, ibid, 113.
 (x) 1 Mer. 218—230.
 (y) Eccles v. England, 2 Vern. 466.
 (z) Pierson v. Garnet, 2 Bro. C. C. 38; See 1 Bro. C. C. 142, 143.
 (a) 1 Bro. C. C. 144.
 (b) Massey v. Sherman, Amb. 520.



The following are cases in which a trust has been held to be created in the devisee to devise:—

In *Eacles v. England*, a person bequeathed in the words: "I give unto my loving kinsman, Richard Hammerton, the sum of 300*l.*, 100*l.* part whereof he doth owe me; which I do intend to give to my cousin, Susan Hammerton, his youngest daughter; but my will and desire is, that he will give the said 300*l.* unto his daughter Susan, at the time of his death, or sooner, if there be occasion for her better advancement and preferment." Richard Hammerton died before the testatrix. Susan, the daughter, died at the age of sixteen, and unmarried. The plaintiff's wife was administratrix to her. It was decreed, that the 100*l.* bond to the testatrix should be assigned to the plaintiffs, and the 200*l.* paid with interest from the exhibiting of the bill.(c) In *Mason and Limbery*, the words of the will were, "I give to my brother, Robert Mason, 2000*l.*, which I desire him at his death to give to his son and his children, and to the children of his late daughter, as he shall think fit." Robert Mason died in the life-time of the testator; after whose death, the children of Robert and his daughter, [the children of the son and the daughter] were held entitled to the 2000*l.* in equal shares.(d) In *Harding v. Glyn*, Nicholas Harding, by his will, gave "to Elizabeth his wife, all his estate, leases, and interest *in his house in Hatton Garden; and all the goods, furniture, [*233] and chattels therein at the time of his death; and also all his plate, linen, jewels, and other wearing apparel; but did desire(e) her, at or before her death, to give such leases, house, furniture, goods, and chattels, plate, and jewels, unto and amongst such of his own relations, as she should think most deserving, and approve of." The testator died without issue. Elizabeth, his widow, made her will, and by it gave all her estate, right, title, and interest in the house in Hatton Garden, to Henry Swindell; and after giving to Caleb Harding all her plate, and bequeathing several other legacies, gave the residue of her personal estate to the defendants, her executors. She soon after died without having, at or before her death, given any part of the property bequeathed to her, excepting the plate, amongst her husband's relations. A bill was filed, to have the property distributed amongst the husband's next of kin. By the Master of the Rolls: "The first question is, if this is vested absolutely in the wife; and the second, if it is to be considered as undisposed of, after her death, who are entitled to it? As to the first, it is clear the wife was intended to take beneficially during her life only. There are no technical words required in a will; but the manifest intent of the testator is to take place, and the words "willing," or "devising," have been frequently construed to amount to a trust; *Eacles v. England*, 2 Vern. 466; and the only doubt arises on the persons who are to take after the wife. Where the uncertainty is such, that it is impossible for the Court to determine what persons are meant, it is very strong [reasonable] for the Court to construe it only as a *recommendation* to the first devisee, and make it absolute as to him; but here the word "relations," is a legal description, *and this is a devise to such relations, [*234] and operates as a trust in the wife, by way of power of naming and apportioning; and her non-performance of the power [trust]

(c) 2 Vern. 466.
(d) Cited Amb. 4.

(e) See 2 Bro. C. C. 46.

shall not make the devise void, but the power shall devolve on the Court; and although this is not to pass by virtue of the Statute of Distributions, yet that is a good rule for the Court to go by. And therefore I think it ought to be divided among such of the relations of the testator, Nicholas Harding, who were his next of kin at her [his wife's] death." (f) In *Brown v. Higgs*, it was said by the Master of the Rolls, that, in *Harding v. Glyn*, "the Court seems to have held, that under the word, 'relations,' the widow of the testator might, if she thought fit, include persons not next of kin; but as to so much as she had not disposed of, it would go to such persons as were next of kin according to the Statute of Distributions." (g) In *Clifton v. Lombe*, in the will of Sir Thomas Lombe were the words, "In consideration that Lady Lombe has promised to give what I shall give her, to her and my children, at her death, I give her," &c. These words were held to create a trust for the children. (h) In *Massey v. Sherman*, a devise of copyholds to testator's wife in fee, "not doubting but that my wife will dispose of the same to and amongst my children, as she shall please," was held to create a trust for the children as the wife should appoint. (i) In the *Earl of Bute v. Stuart*, a testator devised certain estates and collieries to trustees, upon trust to convey and dispose of the same in such manner as the Countess of Bute, his daughter, should direct or appoint. This devise the testator explained by a further clause in the will, which declared that, although his meaning was [*235] to give his daughter the *absolute disposal of the collieries, &c., to prevent the expenses and trouble that must attend the management of affairs of such a nature, under the direction of the court of Chancery, he requested his daughter to direct the money arising therefrom, to be applied in such manner as he had directed the same in default of her direction and appointment. The Countess of Bute appointed to her husband in fee. On a bill by the Earl of Bute for a conveyance from the trustees, Lord Northington held the appointment void, and that the power given to Lady Bute was, by the explanatory clause, intended to be a power to *sell* the estate. (j) If Lady Bute had sold the estate, it appears to have been considered, that the *request* of the testator to Lady Bute to direct the application of the purchase money amounted to a *desire*, and that she had no choice in directing the application of it. (k) In *Nowlan v. Nelligan*, the father of the plaintiff made a will in the words, "I give and devise to my beloved wife, Harriet Nowlan, all my real and personal estate. I make no provision expressly for my dear daughter, knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; but in case of death happening to my said wife, in that case, I hereby request my friends Staples and Hunter to take care of, and manage to the best advantage of my lovely daughter Harriet Nowlan, all and whatsoever I may die possessed of." The executors got in the personal estate of the testator, and with it purchased 11,000*l.* 4 per cent. annuities. The mother afterwards married the defendant, Nelligan, and, by a settlement previous to the marriage, 5000*l.* part of the 11,000*l.* were settled to the use of the daughter at 21, or marriage, and the remaining 6000*l.* on the mother and her intended

(f) 1 Atk. 469. See 5 Ves. 501. 8 Ves. 571.

(g) 5 Ves. 502.

(h) Amb. 519.

(i) Ibid. 520.

(j) 2 Eden, 87.

(k) Ibid. 104, 106.



husband, and the children of the marriage. It was decreed, that under the will, the wife was entitled *to the 11,000*l.* for her life, [*236] subject to a maintenance for the daughter, and that the daughter was entitled to the whole fund at her mother's death.(*l*) In *Pierson v. Garnet*, a testator bequeathed personal property to Peter Pierson, his executors, administrators, and assigns; and added, "and it is my dying request to the said Peter Pierson, if he shall die without leaving issue living at his death, that the said Peter Pierson do dispose of what fortune he shall receive under this my will, to and among the descendants of my late aunt, Anne Coppinger, his grandmother, in such manner and proportion as he shall think proper." It was decreed by the Master of the Rolls, that the words in this will were imperative, and created a trust in favour of the descendants of Anne Coppinger.(*m*) And, on appeal, the decree was affirmed by Lord Thurlow. "In this case," said his Lordship, "the devisee takes only an estate for life in the produce of the fund: the intention of the testator was, that if he had children, he should take an absolute power of disposal; if not, it should go to the descendants of his aunt. If the word used had been *relations*, it would go to those within the Statute of Distribution; but, under these words, it will go only to such relations as are descendants, which is still more limited.(*n*)

The farther cases referred to in the margin(*o*) are to the same purpose. In each, the particular words in the will were held to create a trust.(*p*)

*In the following case, a trust to devise has been held not to be created in the devisee; the parties to be the devisees [*237] over being too indefinitely named.—

In *Harland v. Trigg*, Philip Harland devised in the words, "And all other my leasehold estates in the parish or township of Sutton I give to my brother, John Harland, for ever, hoping he will continue them in the family." By Lord Thurlow: "I have no doubt, but a requisition made with a clear object will amount to a trust. In the case of the Duchess of Buckingham's will, the words were very gentle, but had a distinct object; but where the words are not clear as to their *object*, they cannot raise a trust . . . I had a doubt, whether the family could not claim some interest in the subject; but when I come to consider, I take the rule of law to be this; that two things must concur to constitute these *devisees*—the terms and the object. 'Hoping' is in contradistinction to a direct devise; but, whenever there are annexed to such words, precise and direct objects, the law has connected the whole together, and held the words sufficient to raise a trust; but then the objects must be distinct: where there is a choice, it must be in the power of the devisee to dispose of it either way. If he had sold these leaseholds, the family could not have taken them from the vendee: or, if he had given them to any one part of

(*l*) 1 Bro. C. C. 489.

(*m*) 2 Bro. C. C. 38.

(*n*) Ibid, 230.

(*o*) *Brown v. Higga*, 4 Ves. 708. 5 Ves. 495. 8 Ves. 561. *Cruwys v. Colman*, 9 Ves. 319. *Taylor v. George*, 2 Ves. & B. 378. *Birch v. Wade*, 3 Ves. & B. 198. *Prevost v. Clarke*, 2 Madd. Rep. 458. *Forbes*

v. Ball, 3 Mer. 437. *Pope v. Whitcombe*, ibid, 689. *Horwood v. West*, 1 Sim. & St. 387.

(*p*) See also *Godolphin v. Godolphin*, 1 Ves. 21. *Vernon v. Vernon*, Amb. 3. *Cloudesly v. Pelham*, cited ibid, 5. 1 Vern. 411.

the family, the others could have no remedy. The will does not import a devise, as the words do not clearly demonstrate an *object*.”(q)

In the cases which follow, a trust to devise has been held not to be created in the devisee, he not been unauthorized to dispose of the property in his life-time,—

[*238] In *Palmer v. Schribb* a person devised the residue of his estate to his wife, and desired her to give all her estate at her death, to his and her relations. The Lord Chancellor Harcourt thought these words “too general to amount to a devise over of the testator’s estate after the death of the wife; nor can it be taken as a trust, because the words extend [only] to all the estate which she shall be possessed of at the time of her death, which the husband has not any power over; and, therefore, it must be taken as a recommendation, and not as a devise or trust. But if the testator had desired his wife by his will, to give at her death all the estate, which he had devised to her, to his and her relations; there the estate devised to her ought to go, after her death, to his and her relations, according to the Statute of Distributions.”(r) In *Bland v. Bland*, a testatrix devised all her real and personal estate to Sir John Bland, his heirs, executors, administrators, and assigns, chargeable with the payment of all her husband’s debts, and her own, and also with the farther sums of 4000*l.* and 2000*l.* The will then says, “and it is my earnest request to my son, Sir John Bland, that, on failure of issue of his body, he will sometime in his lifetime, either by will, or any other writing, settle the said premises, or so much thereof, as he shall stand seized of at the time of his decease, so and in such manner as that, on failure of issue of his body, the same may come to my daughter, Mrs. Jacob, and the heirs of her body,” &c. It appears a trust was held not to be created in Sir John Bland under this will, principally from the words “or so much thereof as he shall stand seized of at the time of his decease.” “There is no request,” said Lord

[*239] Hardwicke, “to settle the whole ‘lands, or any particular part; but a power is left in him to dispose of, sell, or give away the whole estate in his life, and only ‘so much as he should stand seized of at his death, she requests he would settle. It is as much as if she had said, ‘I leave it to you to dispose of as you think fit, but I shall be glad if you will give as much as you can spare, so and so.’ Sir John might have sold this, or settled it for the advancement of a son or daughter.” His Lordship added, “I do not lay it down, that in a will a request may not amount to a legacy, but it should be limited to some *certain* thing, or for some *certain* part of a thing, and not left absolutely to the pleasure of the person to whom the request is made.”(s) In *Wynne v. Hawkins*, a person by his will, after giving some pecuniary legacies, proceeded, “Not doubting but that she [testator’s wife] will dispose of what shall be left at her death to our two grandchildren, all the rest and residue of my personal estate I give and bequeath to my loving wife Mary.” By Lord Thurlow: “If a bill had been filed in the life-time of the wife, could I have ordered this money to be laid out, and that she should receive the interest for her life, and then it should go

(q) 1 Bro. C. C. 142.

(s) 2 Cox Rep. 349, 354, 356.

(r) 2 Eq. Cas. Abr. 291, pl. 9. See also *ibid.*, pl. 8, apparently S. C.

over? These are equivocal words, the intent of which is to be gathered from the context. If the intention is clear, what was to be given, and to whom, I should think the words 'not doubting' would be strong enough. But where, in point of context, it is uncertain what property was to be given, and to whom, the words are not sufficient, because it is doubtful what is the confidence which the testator has reposed. Here he meant this fortune to pass through the pleasure of his wife, leaving it to her to use what she pleased, and consequently to make the residue such as she chose."(*t*)

*The cases referred to(*u*) are farther authorities to the [*240] same effect.(*v*)

In *Cunliffe v. Cunliffe*, a person devised certain "sugar-houses, stock in trade there, and the appurtenances thereto belonging, to his son, Ellis Cunliffe: nevertheless, in case his son Ellis, should happen to depart this life without a son or sons born of his body in his life-time, or in due time after his death, then and in such case he *recommended* it to him to give and devise the said sugar-houses, and stock in trade there, to his brother Robert." On this will, the Lord Commissioners, Smythe and Aston, held the words used by the testator to amount to a mere *recommendation*. A trust, in consequence, was not created in the devisee.(*w*)

SECTION XXV.

OF EXECUTORY DEVISES.

THE chief object of a settlement of real property on several persons is, to entitle them, in succession, to the enjoyment of the land for years, for life, in tail, or in fee. And the two chief cares of the law on a settlement of real property are, to prevent a vacancy in the possession of the freehold, and the creation of a perpetuity. The technical *forms of particular estate and remainder, which are [*241] found in a common law deed, are not required in a settlement by will; and, in their place, the informal limitations, called executory devises, are permitted to have the effect of technical limitations. Irregularity of form in a will is, nevertheless, not permitted either to put the freehold in abeyance, or to create a perpetuity. In the exposition, therefore, of executory devises; subserviently to the rules against the abeyance of the freehold, and the creation of a perpetuity, the aim of the law is, to fulfil the intention of the testator; and, moreover, it should seem, to give to the irregular limitations of the will the *effect* of a settlement in form by deed. If A., seised in fee, devises on a contingency, within the legal perpetuity, to B. in fee; until the contingency happens, the freehold in

(*t*) 1 Bro. C. C. 179.

(*u*) *Le Maitre v. Bannister*, cited 2 Bro. C. C. 40, 46. *Sprange v. Barnard*, 2 Bro. C. C. 585. *Eade v. Eade*, 5 Madd. 118. *Curtis v. Rippon*, *ibid*, 434.

(*v*) See also *Countess of Bridgewater v. Duke of Bolton*, 1 Salk. 236. Attorney

General v. Hall, cited 2 Cox Rep. 355. *Dolton v. Hewen*, 6 Madd. 9.—*Bull v. Vardy*, 1 Ves. jun. 270, is a case of a power to bequeath.

(*w*) Amb. 686. See 2 Bro. C. C. 46; also *Le Maitre v. Bannister*, cited *ibid*, 40,

46.

possession, being undisposed of, descends to the testator's heir at law.(x) The descent prevents the abeyance of the freehold; and, in effect, a particular estate, with a limitation over, are created by the will; namely, to the heir at law until the contingency happens, and, on the contingency, to B., and his heirs. So, if A., seised in fee, devises to B. and his heirs, until C. shall attain 21, and if C. should live to that age, or have issue, then to C. in tail; but if C. should happen to die before the age of 21, or without issue, to D. in tail; until C. has issue, or attains 21, B. is the tenant of the freehold; and as soon as C. has issue, or attains 21, C. becomes tenant in tail, remainder to D. in tail. The limitations in the latter supposed case are the executory devises in the will in *Brownsword v. Edwards*,(y) a direct point of which case, it may be added, is, that in [*242] the words, "but if C. should *happen to die before the age of 21, and without issue," to fulfil the intention of the testator, the word 'and' was construed *or*. An incidental point in the same case is, that although a limitation on an executory devise is necessarily itself an executory devise;(z) yet, notwithstanding it may be uncertain if the contingent interest under the first executory devise will ever become an estate, there may still be a certainty that the interest under the second executory devise will become one. It was uncertain if C. would ever reach 21, or have issue; but it was certain that the interest of D. would become an estate-tail. Until C. attained 21, or had issue, the devise to C. was executory, and the devise also to D. Had C. had issue, immediately C. would have had an estate-tail, and D. a *remainder*, an estate-tail in remainder. So also when, as was the case, C. attained 21, C. had an estate-tail, and D. a vested remainder in tail.

In the case also where, by the lapse of a particular estate, a limitation in remainder is necessarily at the death of the testator construed to be an executory devise, the freehold in possession will descend to the heir at law of the testator, until the interest under the executory devise becomes an estate.(a)

It further appears, that, on an executory devise of lands of inheritance, the heir at law of the testator is entitled to the intermediate rents and profits of the land;(b) unless, by the executory devise, the interim rents and [*243] profits *are to accumulate, and, with the land, are also devised to the devisees;(c) or, unless by a residuary(d) clause they are devised: or, in some other way(e) are disposed of in the will.

The heir at law has been held entitled to the interim rents in the cases which follow:—

In *Hopkins v. Hopkins*, a testator devised his real estate to trustees, and their heirs, to the use of them and their heirs, in trust for Samuel

(x) *Pay's Case*, Cro. Eliz. 878. *Gore v. Gore*, 2 P. W. 28. *Hayward v. Stillingfleet*, 1 Atk. 422.

(y) 2 Ves. 243.

(z) *Gore v. Gore* 2 P. W. 28.

(a) *Hopkins v. Hopkins*, Cas. temp. Talb. 44.

(b) *Hopkins v. Hopkins*, Cas. temp. Talb. 44. *Bland v. Bland*, 2 Cox. 349. *Bullock v. Stones*, 2 Ves. 521. See also *Chambers v. Brailsford*, 18 Ves. 368.

(c) *Chapman v. Blisset*, Cas. temp. Talb. 145. *Gibson v. Lord Montfort*, 1 Ves. 465. *Gibson v. Rogers*, Amb. 93. S. C. *Glanvill v. Glanvill*, 2 Mer. 38. *Genery v. Fitzgerald*, Jacob Rep. 468.

(d) *Stephens v. Stephens*, Cas. temp. Talb. 228. *Gale v. Gale*, 2 Cox. 138.

Duke of Bridgewater v. Egerton, 2 Ves. 122.

(e) *Bullock v. Stones*, 2 Ves. 521.

Hopkins, son of John Hopkins, for life; and, from and after his decease, in trust for the first and every other son of the body of the said Samuel, and the heirs male of the body of every such son; and, for want of such issue, in case the said John Hopkins should have any other son or sons of his body, then in trust for all and every such son and sons, respectively and successively, for their lives, with remainders over; the ultimate trust for the testator's own right heirs for ever. The will farther contained a proviso, which postponed the full enjoyment of the rents and profits of the estate by the sons of John Hopkins until they attained 21. Samuel Hopkins died in the testator's life-time without issue. At the time of the death of the testator, John Hopkins had no other son. It was first determined, that the limitation to the other sons of John Hopkins might operate as an executory devise. "The next question," said the Lord Chancellor Talbot, is, what is to become of the rents and profits, in case this be taken to be an executory devise, until the birth *of a son to John Hopkins? And this must depend [*244] upon the wording of the proviso; by which words none are affected but such as are come to the estate under the limitations. It restrains them from having any thing to do with the estate until they attain the age of 21, and provides the surplus, beyond their allowance, to be laid up for them; but here is no provision made what shall become of those rents and profits until a son be born. But, until somebody is *in esse* to take under this executory devise, the rents and profits must be looked upon as a residue undisposed of, and consequently must descend upon the heir at law; the case being the same, where the whole legal estate is given to the trustees, and but part of the trust disposed of, as in this case; and where but part of the legal estate is given away, and so, the residue undisposed of, the legal estate descends upon the heir at law." (f)

In *Bland v. Bland*, Sir John Bland devised to his wife for a term of 14 years, to commence from his decease, in trust to raise annuities for his younger children, and to pay all his debts, legacies, and funeral expenses. He then declared his will to be, that as soon as such annuities and his debts and legacies and funeral expenses should be paid, the said term of fourteen years should cease; "and he gave the lands comprised in the said term, from and after the expiration of that trust, to certain trustees, until the defendant, Sir John Bland [the eldest son of the testator] had a son of the age of 21 years; to whom they should deliver up the possession of all his real estate comprised in the said term, with all the arrears and profits that should have accrued before that time: with this proviso, however, that he should entail all those real estates on some or one of his brothers (if he should have *no son who should [*245] arrive at the age of 21 years,) who should come next to the title of baronet." He then declared, that neither his real nor personal estate should be put in the power of his son John, but be preserved for the use of his eldest and other sons in tail male, and after them to the use of his (the testator's) son, Hungerford, and his first and other sons in like manner. By Lord Hardwicke: "As to the devise to trustees after the determination or cesser of the estate of fourteen years to the lady Bland, that must be looked upon as a devise in fee, because the trust cannot be performed without it. As to the rents and profits that are to ac-

crue until Sir John Bland has a son aged 21, I am of opinion these will belong to Sir John Bland, the defendant. This case very little differs from that of *Hopkins v. Hopkins*, (Forr. 44,) where there was a proviso, that none of the persons, to whom the estates for life were limited, should be in possession thereof until their ages of 21, and then to go to such persons as should first be entitled; there were none of the remainder-men *in esse*, and no proviso what was to become of the rents until a son was born, and therefore they were looked upon as a residue undisposed of, and went to the heir at law. A man cannot say negatively, my heir at law shall not have my estate, but he must make a complete disposition of it to somebody else." His Lordship declared, "that Sir John Bland, as heir at law of his father, was entitled to the surplus of the rents and profits of the trust estate as should accrue during the continuance of the term of fourteen years; and also to such surplus rents and profits as should accrue from the determination or ceaser of the said term, until he should have a son born, as being undisposed of by the will of Sir John Bland, the father. (g)

[*246] *In the cases which follow, the interim rents and profits have been held to be intended to accumulate, and, with the land, to be devised to the devisee of the executory devise.—

In *Gibson v. Lord Montfort*, a person devised all and singular his freehold, leasehold, copyhold, and also personal estate of what kind soever, to trustees, their executors, administrators, and assigns; in trust to pay several annuities, sums, and legacies, by and out of the produce of the personal estate: if that should happen to be deficient, then to pay the same by and out of the rents, issues, and profits arising by the real estate: and as for and concerning all the rest, residue, and remainder of the real and personal estate, of what nature and kind soever, after provision being made for the payment of the legacies, &c., he gave the same to such child or children, as his daughter should have lawfully begotten, whether male or female, equally to be divided between them; if his daughter should die without such issue of her body, then he devised the same to two other persons, equally to be divided between them, share and share alike. On this will, it became a question, with respect to the surplus rents and profits of the real estate, after satisfaction of the particular charges on it created by the will, until such time as the person to whom the testator devised on contingency, namely, a child of the daughter, came *in esse*; whether they were to go either as part of the residue [the estate devised,] to attend the several limitations of that residue [estate,] or to the testator's heir at law. Lord Hardwicke first determined, that the trustees took under the will the legal estate in fee; and, secondly, that the surplus rents, until the contingency of the executory trust took place, were devised away from the heir. "It is admitted," [*247] said his Lordship, "that the testator might, by express words, *have given the surplus rents and profits that should accrue, before the daughter had a child, or died without issue, away, either to such child when born, or to the person to take when she died without issue. The question then is, whether by express words, or plain necessary implication, they are given away from the heir at law; and I am of opinion that, by plain necessary construction, they are. It is

pretty hard to say, that, in any case, where one devises all the rest and residue of his real estate, the heir should be enabled to claim any thing out of it; and how can he claim or take these intermediate profits? He must claim them as part of the real estate undisposed of. As to the surplus interest and profits of the personal estate, they are admitted to pass; and both real and personal being comprised in the same clause is a strong argument against a resulting trust to the heir at law. On the whole, I am of opinion that these surplus rents must be received by the trustees, accumulated, and laid up.”^(A) In *Glanvill v. Glanvill*, a testator, after making a provision for the maintenance of his son Thomas William, and of his daughter Emily, gave the residue of his property in the following words: “And as to all the rest, residue, and remainder of my estate and effects, as well real as personal, or of what other nature or kind soever, I give and devise the same unto and to the use of my son Thomas William Glanvill, according to the nature of the same estates respectively, and to be a vested interest upon his attaining the age of 21; provided, that in case my said son shall happen to die before attaining the said age of 21, then all the rest and residue of my said real and personal estate, so given and devised unto him, shall go and belong to my daughter Emily Glanvill.” On this devise, the rents and profits of the real estate were decreed to be accumulated until the devisee, Thomas William Glanvill (who was also the testator’s heir at law,) [*248] should attain 21; or, until his death, which should first happen.⁽ⁱ⁾ In *Genery v. Fitzgerald*, a testator, after subjecting his real and personal estate to the payment of his debts, legacies, and annuities, and making provision for the maintenance of his reputed children, Edward, Thomas and William Fitzgerald, during their minorities, proceeded thus: “All the rest, residue, and remainder of my estate, real, personal, or mixed, or of what nature or kind soever the same may be or consist, and wheresoever situate, subject as aforesaid, I give, devise, and bequeath the same, and every part thereof, unto the eldest of my said three reputed children, who shall attain the age of 21, his heirs, executors, administrators and assigns for ever.” The testator was seised of some real estates in the island of Jamaica (subject to a mortgage,) with the slaves, the cattle, and other stock upon them. The defendant, Thomas Fitzgerald, the brother and heir at law of the testator, claimed to be entitled to these premises, and to the rents and profits, subject to the mortgage, until one of the infant sons of the testator should attain the age of 21. A decree pronounced at the Rolls declared, that the defendant, Thomas Fitzgerald, was not entitled to the rents and profits during the minority of the infants; and, on appeal, Lord Eldon affirmed the decree. “I think,” said his Lordship, “this decree is right. The general principles are these: When personal estate is given to A. at 21, that will carry the intermediate interest. If a testator gives his estate, Blackacre, at a future period, that will not carry the intermediate rents and profits. But when he mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention, that the same rule shall operate on both. Here the property was partly real, partly personal, and partly of [*249] such a description that the testator does not seem to have known whether it was real or personal. He does not by his will create any trust, but makes a legal devise and bequest of the whole together.

(A) 1 Ves. 485. Amb. 93.

(i) 2 Mer. 38.

houses and premises should go, descend, and come to the testator's nephew, William Studholme, his heirs and assigns for ever. The infant son, Michael Hodgson, died within a few days of his age of 21. Mary [*253] Hodgson having no other child, William Studholme, the devisee over, brought his bill for an account of the testator's personal estate, and to have the same secured and set apart, to the end that, in case the contingency of the death of Mary Hodgson without children should happen, he might receive the same; and that, in the meantime, the money arising from the rents and profits might be placed out on securities, in order to wait the event of the contingency. It was decreed, "The profits of the residue from the death of Michael [the rents of the houses from the death of Mary Procter, the tenant for life,] till the contingency happens, are to accumulate and be added to the capital; and, if no child of the defendant, Mary, by her husband Cuthbert, then to go to the plaintiff." (o) In *Green v. Ekins*, a testator devised all the residue of his personal estate to any son he should have by his wife at his age of 21; and, if no son, then to his daughter Frances, to be paid her at her age of 21, or marriage; but if it should happen, that his daughter Frances, should depart this life before 21, or marriage, and he should have no other daughter born of his wife, who should attain 21, or marry; then, and in such case, if his daughter, Elizabeth Burnaby, should have issue of her body one or more son or sons, he gave and bequeathed the residue of his personal estate to such son of his said daughter as should first attain the age of 21. The testator died soon after making the will, and, within half a year after his death, Frances, his daughter, died an infant; and the plaintiff being entitled, when of age, to the estate bequeathed, it became a question, whether the interest of the personal estate, from the death of Frances, the daughter, to the time it would vest in the plaintiff, or any other son of Mrs. Burnaby, must be accumulated, and wait on the contingency; or whether it was an interest undisposed [*254] of, and went to the next of kin of the testator. By Lord Hardwicke: "During the life of Frances, the daughter, the profits vested in her, because the residue did so; as it was a legacy payable at a future time, and divested on the contingency. As to the rest of the profits which have accrued and will accrue till the devise to the son of Mrs. Burnaby vests, I am of opinion, that the interest and profits must be considered as a part of the residue, and must accumulate. The case of *Studholme v. Hodgson* is in point. I do accordingly decree the profits to accumulate." (p)

SECTION XXVI.

OF A DEVISE TO USES.

It cannot, it is apprehended, at the present day be doubted, that the Statute of Uses, 27 Hen. VIII., c. 10, does, and was intended by the legislature to, operate on limitations to uses in a will. (q) There is reason

(o) 3 P. W. 300.

(p) 2 Atk. 473.

(q) See Sugd. Powers, 3rd edit. 134—139. Sugd. Gilb. Uses, 3rd edit. 356, note 3.

perhaps to be surprised, that the point was ever considered to be questionable. The Statute of Wills, 32 Hen. VIII., c. 1, did not originate devises, but simply extended the right to devise, which right has been farther extended by the statute 12 Car. II., c. 24, which abolished tenure by knight-service. That the Statute of Uses operates on uses in a will appears conclusive from the circumstances, that, by particular custom, it was legal to devise before the Statute of Wills; that the preamble of the Statute of Uses in enumerating the usual conveyances to uses, mentions, by name, conveyances by *will*; and that the enacting part of the same statute includes, also by name, a seisin to uses *by reason of a will*.

*On a conveyance, by deed or will, to uses, the design and effect of the Statute of Uses are, immediately on the conveyance, to take from the trustee the seisin conveyed to him. The statute operates, if at all, immediately; and when it does, the estate of the trustee passes to and from him in the same instant. In indulgence to testators, the effect of the statute on a will depends on the intention of the person who makes it. A will is construed not to be affected by the statute, if the seisin conveyed is intended, for any purpose of trust, to remain in the devisee.^(r) The seisin of a devisee in fee is, in particular, construed to be intended to remain in him, when the words of the devise import that the devisee is himself to receive the rents and profits of the estate, and to pay them over to a married woman,^(s) or other^(t) person for life. In these cases the *cestuis que use* are, in consequence, held to take an equitable estate only under the will. But it appears, if the words of the devise import simply that the *cestui que use*, a married woman or other person, is to be permitted to receive and take the rents and profits of the estate, the devise is construed not to create a trust; and the will being then left to the ordinary effect of the Statute of Uses, the *cestui que use* is, in consequence, held to take a legal estate under the will.^(u)

It not being legal to devise a fee on a fee;^(v) if, on a devise to A. in fee, the Statute of Uses does not affect the devise, *it follows [*256] that, A. retaining the legal estate in fee, if there is a farther devise to B., the interest of B. cannot, during the continuance of the estate in fee of A., be a legal estate;^(w) and, also, that B. cannot be entitled to a legal estate devised to him, excepting by way of executory devise. But if a person, seised in fee, devises to A., in trust; with a farther devise to B.; if, on the intention, the estate of A. is a *chattel* estate only, B. may take a legal estate in remainder under the devise.^(x) It may here also be observed, that a limitation to a person and his heirs does not invariably in a will convey a fee-simple; it is frequently, on the intention, construed to convey an estate *pur autre vie* only; in which case, a limitation over may convey a legal estate.^(y)

(r) Gregory v. Henderson, 4 Taunt. 772.

(s) Nevil v. Saunders, 1 Vern. 415. Harton v. Harton, 7 T. R. 652. Gregory v. Henderson, 4 Taunt. 772. Tenny v. Moody, 3 Bingh. 3. See also South v. Allyn, 5 Mod. 101, 1 Salk. 228.

(t) Silvester v. Wilson, 2 T. R. 444. Cooper v. Wyatt, 5 Madd. 482.

(u) Broughton v. Langley, 2 Ld. Raym. 873. Doe ex dem. Leicester v. Biggs, 3 Taunt. 109.

(v) Tilbury v. Barbut, 3 Atk. 617.

(w) Bagshaw v. Spencer, 2 Atk. 570; 1 Ves. 142. Wright v. Pearson, Amb. 358; 1 Eden, 119.

(x) Cordal's case, Cro. Eliz. 316. Warter v. Hutchinson, 1 Barn. & C. 721.

(y) Jones v. Lord Say & Seal, 1 Eq. Abr. 383. (See 2 Atk. 578; 7 T. R. 654; 3 Bos. & P. 179.) Shapland v. Smith, 1 Bro. C. C. 75. Doe v. Simpson, 5 East, 162. Doe v. Barthrop, 5 Taunt. 382. Hawker v. Hawker, 3 Barn. & A. 537. Biscoe v. Perkins, 1 Ves. & B. 485.

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*CHAPTER XVI.

OF DISINHERITING AN HEIR AT LAW.

A TITLE by descent is an older branch of the law of real property, than the right to devise. Lands held in fee descended, before, by particular custom, the tenant acquired the right to alien by will. By the Statute of Wills, all tenants in fee are authorised to devise in fee-simple; but, by the common law, the lands descend if they are not devised. The meaning, therefore, of the repeated proposition, that "an heir at law is not to be disinherited except by express words, or necessary implication,"^(a) seems to be, that the title of an heir at law cannot be supplanted by will, unless the lands are devised, by express words or necessary implication, to another person. If an heir at law is expressly, in the strongest language, disinherited; or, by a trifling bequest, is, on the vulgar notion, cut off with a shilling, and so is impliedly disinherited, still it is not enough, unless there is in the will a devise to supplant the title by descent. It is not an intention to disinherit the heir, but a devise away from him, that can disinherit him.^(b) In *Denn v. Gaskin*, a person devised in the words: "As to all such wordly estate as God has endowed me with, I give and bequeath as follows: I give, bequeath and devise all that my freehold messuage and tenement, lying in Gaitsgill, in the parish of Dalston, to Matthew Robinson, George Robinson, and Thomas Robinson, equally to them my sister's sons." The testator then, [*258] after bequeathing several small pecuniary legacies to most of his relations, gave to John Gaskin, his heir at law, ten shillings. All the rest of his goods, chattels, and personal estate whatsoever, he gave to the devisees mentioned. On this will it was held, that the devisees took only an estate for life in the real property. "It is settled in devises," said Lord Mansfield, "as well as in deeds, that if no words of limitation are added, the devisee can only take an estate for life. But as there are no technical words necessary in a will, if the testator makes use of what is tantamount; as if he says, "I give to such a one in fee simple," or "all my estate;" that will carry all his interest in the land devised. But there must be words in the will, to control the rule of law, which, I believe, in a variety of cases, thwarts the intention of the testator. I suspect extremely, that in this very case, the testator meant to give his nephews a fee in the premises in question; for he had no other landed property. He makes them residuary legatees of his personalty, and gives a disinheriting legacy to his heir at law, agreeable to the vulgar notion, taken from the Roman law, that an heir is cut off with a shilling; because, by the Roman law, a will that passed by the heir was called *inofficiosum testamentum*." His Lordship, after Mr. Justice Aston had expressed his opinion, farther said, "although the intention is ever so apparent, the heir at law must of course inherit, unless the estate is given to somebody else."^(c)

It appears, then, an heir at law cannot be disinherited, unless the estate is devised away from him to a devisee, either expressly or by implication;—it is often said, by *necessary* implication. There are many ob-

(a) Wills, 140. 3 East, 521. 3 Dow.
210.

(b) Cas. temp. Talb. 52, 2 C. x, R. 356.

(c) Cowp. 657.

servations to be found on the expression "necessary implication."^(d) They were originally the words of the Chief Justice Vaughan, "in *Gardner v. Sheldon*, in which he stated: "In a will, es- [*259] tates are often given by implication. But I shall take this difference concerning estates that pass by implication, although it be by will. An estate given by implication of a will, if it be to the disinheriting of the heir at law, is not good, if such implication be only *constructive* and *possible*, but not a *necessary* implication. I mean by a *possible* implication when it may be intended, that the testator did purpose, and had an intention to devise his land to A., but it may also be as reasonably intended, that he had no such purpose, or intention to devise it to A. But I call that a devise by *necessary* implication to A., when A. must have the thing devised or none else can have it. And, therefore, if the implication be only *possible*, and not *necessary*, the testator's intent ought not to be construed to disinherit the heir, in thwarting the dispose which the law makes of the land, leaving it to descend, where the intention of the testator is not apparently, and not ambiguously, to the contrary. To this purpose is the case in 8 Car. 1."^(e) The case, which his Lordship cites, is *Spirit v. Bence*, in which it was held, "that the words in a will, which disinherit the heir at the common law, ought to have an apparent intent, and not to be ambiguous and doubtful."^(f) In *Moone v. Hease-man*, the Lord Chief Justice Willes observed; "The rule is, as it is expressly laid down in the case of *Gardner v. Sheldon*, that an heir shall never be disinherited, except by express words, or such as have a necessary implication. But if this rule were to be taken strictly, it would overturn a great many resolutions. I might mention a multitude of cases to this purpose. If a man devise an estate to another, paying his debts, or paying a certain sum in gross, the devisee takes a fee simple. And so it is expressly held in many cases. And the reason [*260] *which is given for it is, that every devise must be taken to be intended by the devisor to be for the benefit of the devisee; whereas, if he be obliged to pay the debts of the devisor, or a certain sum in gross, if the devisee should happen to die before he can raise the money out of the profits of the estate, if he were only to take an estate for life, he would be damnified and not benefitted by this devise. But if Vaughan's rule were to hold, there would be an end of this way of reasoning, and all those cases must be overturned. For although the expression of paying the debts, &c., makes it highly *probable* that it was the devisor's intention that the devisee should have an estate in fee, yet it was very far from being a *necessary* implication. For, in many of the cases, the money devised to be paid was not near the value of an estate for *life* in the premises; and therefore it was possible that the testator might intend that he should only have an estate for life, because he might sell that estate immediately, and then he would be sure to be a gainer by the bargain. But as this is a foreign and not a natural construction, it has been always rejected. However these cases shew that my Lord Vaughan's rule is not right. But the rule is, that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited."^(g) "The distinction," Lord Thurlow has said, "which Lord

(d) Willes, 140, 309, 372. 4 Bro. C. C. 534. 1 Mer. 219.

(e) Vaugh. 262.

(f) Cro. Car. 369.

(g) Willes, 140.

Vaughan takes, where the implication is *possible*, and not a *necessary* implication, is well founded, and furnishes a rule to which all judges ought to submit. It is certain, that where the rule of law is clear, and the intent of the man is ambiguous, the law must prevail. Taking the case of Gardner and Sheldon in the strongest view, it is very clear that Lord Vaughan's idea does not dive into a strict necessary implication, but such an intent, [*261] that nothing is "left ambiguous and doubtful." (h) "The expression 'necessary implication,' Lord Eldon has observed, "is frequently applied to cases between a devisee and heir at law; and yet there is hardly a case decided against an heir at law, where the implication upon which it was so decided was of absolute necessity." (i) It is, perhaps, probable, that the "necessary implication" in the rule, that an heir is not to be disinherited except by express words, or necessary implication, means an implication, which, on the evidence of the testator's intention, is, in consideration of law, necessary to fulfil that intention. It is apprehended the substance of the Chief Justice Vaughan's words is, that an heir at law is not to be disinherited by *doubtful* words in a will; and that this alone was his meaning seems proved by the particular mention he makes of the words to the same effect, which are found in the judgment in *Spirit v. Bence*.

It is clear that an heir at law is not to be disinherited by words of *doubtful* intention in a will. *Bowman v. Milbanke* is a case to this purpose. A person seized of lands in Newcastle upon Tyne (where lands were devisable by parol by the custom,) by a parol will devised in the words, "I give all to my mother, all to my mother." It was argued for the plaintiff, that by the word "all," it was uncertain whether the testator intended lands or goods; and for the defendant, that he who gives all excepts nothing; and cases were cited, where by a devise of all the testator's estate, all his estate as well real as personal passed; and where a devise of all the testator's livelihood extended to lands and goods. But it was said by the Court, that "all," is altogether uncertain, and not sufficient to disinherit an heir; and judgment was given, that the lands did not pass by the will. (j)

As an heir at law cannot be disinherited by doubtful words, and conjecture is inadmissible in the exposition of a will, it follows, that, whenever on a devise of lands of inheritance, the words of the will fail to discover the intention, the particular devise is void, and the lands descend to the testator's heir at law. (k)

A distinction may here be noticed between a *legacy* and a *devise*. A legacy which lapses falls into the residue, and passes with it to the residuary legatee; a devise lapses in favour of the testator's heir at law, to whom the lands, which were devised, descend, and do not pass under a devise of the residue. (l) It appears, also, that on a devise to A., remainder to B.; if A. dies in the life-time of the testator, the lapse of this devise to A. is not permitted to prejudice the estate in remainder, and the remainder falls into possession immediately on the testator's

(h) 4 Bro. C. C. 534.

(i) Mer. 219.

(j) 1 Lev. 130.

(k) *Bowman v. Milbanke*, 1 Lev. 130; 1 Keb. 719. *Mohun v. Mohun*, 1 Swanst. 201. *Mason v. Robinson*, 2 Sim. & St. 295.

(l) *Doe v. Underdown*, Willes, 293. *Wright v. Hall*, cited *ibid*, 299. *Urmston v. Pate*, in Chan. 1 Nov. 1794; *Stated* 4 Cruise Dig. 477. 8 Ves. 25. See also *Goodright v. Opie*, 8 Mod. 123; 1 Ves. 141, 322. *Jones v. Mitchell*, 1 Sim. & St. 290.

death.(m) Farther, if the devise to B. depends on a contingency, and A. dies in the testator's life-time; on the death of the testator before the contingency happens, the limitation to B. will be an executory devise, and the freehold estate in possession will descend to the heir at law of the testator, until the contingency in the limitation to B. takes place.(n)

*CHAPTER XVII.

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OF THE EXPOSITION OF A WILL WITH A CODICIL.

A CODICIL is a part of a will.(a) It is, therefore, to be construed with it, and may, as a context, confirm, vary, or altogether change an intention in the will. In *Coward v. Marshal*, a person by his will devised his lands to I., his youngest son, and his heirs; and afterwards married again; and by another will devised the same land to his wife for life, paying annually to I., his youngest son, and to his heirs, a certain rent. On the question, whether the second will was a revocation of the first, *Anderson and Glanville*, Justices, held it to be no revocation, "but that both may stand, although they be by several writings; unless it be manifestly contrary to the first will, or that there be an express revocation therein; but they ought to stand together, if they may, as made by and in one and the same writing. And here the testator's intention appears, that he had not any purpose to alter it as to his son, but only to provide for his wife, whom he afterwards espoused; and by the appointing of the rent to his son, it appears that his intent was, that the reversion should be to his son." It is added in the report, the matter was afterwards ended by arbitrament.(b) Lord Hardwicke has observed on this case, that the doubt in it arose on a second will; "for had it been a codicil, there would have been no question; the instruments being part of one another, and to be taken together."(c) In *Hayes v. Foorde*, a person devised, in remainder, "to the heirs male of my brother, Nicholas Foorde's sons." At the same time, and with the same solemnities and attestation, the testator published a schedule referred to in his will (and which a special verdict in the case found to be a part of the will,) containing an account of all his real and personal estate, in the words: "An account how I dispose of my estate to, &c. [the first devisees in the will] and for want of his [testator's brother, William Foorde] having sons, to my brother Nicholas Foorde's sons." It became a question, whether Nicholas, the nephew, took an estate for life or in tail under the will and schedule. "The only doubt," it was said by the Justices of the King's Bench, "was, whether, by the words of the will, Nicholas, the nephew of the testator, took any estate by implication. That this doubt was removed by the schedule, which expressly gives an estate to the sons of his brother, Nicholas Foorde. That, therefore,

(m) *Brett v. Rigden*, Plowd. 341. *Hartopp's Case*, Cro. Eliz. 243. *Fuller v. Fuller*, ibid. 422. *Perk.* 566, 567, 568; 8 Mod. 126.

(n) *Hopkins v. Hopkins*, Cas. temp. Talb. 44. *Doe v. Roach*, 5 M. & S. 482.

(a) 2 Bl. C. 500.

(b) Cro. Eliz. 721.

(c) 1 Ves. 187.

Nicholas, the nephew, took an estate for life by implication, thus explained; which being conjoined with the estate expressly given to his heirs male, will, by the known rule of law, give him an estate in tail-male."(*d*)

A codicil, legally signed and witnessed to devise lands of inheritance, although land is not devised by it, but only legacies bequeathed, (*e*) and it should seem also, although no mention is made in it of the will, does, of itself, republish the will, (*f*) unless it appears to be the intention of the testator not to republish it. (*g*) A codicil, which republishes a will, new dates it, and makes it a will of the day the codicil is made. The will, afterwards, speaks from the day of the new date. If the codicil [*265] varies the intention in *the will, it, as a context, explains the intention. But if the codicil simply republishes the will, it leaves the intention to be discovered from the words of the will alone, as if the will were originally made on the day of the new date. Circumstances which have intervened between the dates of the will and codicil, are not permitted to introduce an intention on the words of the will, which is not expressed by those words. Land, for instance, which the testator has purchased between the two dates, will pass under the republished will, provided (but in this case alone) there are words in the will sufficient to pass them, supposing the will originally made on the day of the date of the codicil. "Where a man," Lord Mansfield has said, "republishes his will, the effect is, that the terms and words of the will should be construed, to speak with regard to the property he is seised of at the date of the republication, just the same as if he had had such additional property at the time of making his will. Therefore, if one devises lands by the names of B. C. and D., and purchases new lands, and republishes his will, the republication does not concern such new lands, because the will speaks only of the particular lands, B. C. and D. But if the testator in his will says, I give *all* my real estate, a republication will affect such newly purchased lands, because it is then the same as if the testator had made a new will."(*h*) To the same effect are the words of Lord Ellenborough, in *Goodtitle v. Meredith*: "As to the other question, what the effect of the codicil is, that has been settled in a series of cases, beginning with *Acherly v. Vernon* down to *Barnes v. Crowe*, and, lastly, in the more recent case of *Pigott v. Waller*. The effect of all these decisions is, to give an operation to the codicil *per se*, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless, indeed, a [*266] contrary *intention be shewn, in which case it will repel that effect. Such was the case of *Bowes v. Bowes*, where the codicil devised the *said* lands; which word *said* was considered by the judges as controlling the effect and operation of the codicil, confining it to those lands which would have passed under the will as it originally stood, and not extending the will to all the lands at the date of the codicil. Subject only to this restriction, arising out of the intention implied from

(*d*) 2 Bl. R. 698.

(*e*) *Pigott v. Waller*, 7 Ves. 98.

(*f*) *Acherly v. Vernon*, Com. R. 381.

Doe v. Davy, Cowp. 158. *Barnes v. Crowe*,

1 Ves. Jun. 486. *Pigott v. Waller*, 7 Ves.

98. *Goodtitle v. Meredith*, 2 M. & S. 5.

Hulme v. Heygate, 1 Mer. 285. *Rowley v. Eyton*, 2 Mer. 128.

(*g*) *Lady Strathmore v. Bowes*, 7 T. R. 482. 2 Bos. & P. 500.

(*h*) Cowp. 132. See also 7 T. R. 487.

the use of the word *said*, that there the testator does not mean to pass the whole, the general effect of a codicil is, to make the will speak as of its own date."^(w) And, in the same case, it was said, by Mr. Justice Bayley: "It is an established rule, that a codicil, executed to pass real estate, is *primâ facie* a republication of the will, so as to pass after purchased lands. The rule is so, where the codicil relates to personal estate only, and therefore more especially when it relates to the passing of real estate; but, taking it as a general proposition, it may be stated *primâ facie* to amount to a republication of the will."^(x) In the late case of *Rowley v. Eyton*, a person by his will directed his debts to be paid, in the words: "I order and direct that all my just debts and funeral expenses shall be in the first place paid and discharged, and with the payment thereof, I charge all my real and personal estate." The testator, after making his will, purchased several copyhold estates, which he surrendered "to such uses as he should by will, or any codicil thereto, appoint;" and he subsequently made a codicil to his will, executed to pass real estates, and devised the newly purchased copyholds to his son, Thomas Eyton. On a creditor's bill filed against the son, the codicil was held to be a republication of the will, and, in consequence, the after purchased estates decreed to be subject to the devise in the will for the payment of debts.^(y)

*CHAPTER XVIII.

[*267]

OF EXPOSITION ON INTENTION, AND THE INFLUENCE OF AUTHORITY ON CONSTRUCTION.

A GREAT proportion of the cases which have been mentioned appear fully to authorise the general position, with which the present treatise is begun—that the intention of the testator is the law of devises. It cannot, however, be stated more than generally, that the construction of devises is governed by intention; the instances are numerous which prove the position not to be universally true. Frequently the object of a devise is legal, the intention is manifest, and yet the particular intention, it is considered by the courts, cannot be carried into effect. The chief impediment to the fulfilment of intention appears to be *authority*. A great part of the common law consists of adjudged cases, considered by the courts to be precedents, or authorities, they are bound to follow in every new case of a similar nature which comes before them.^(a) Wills appear to be not more independent of authority than any other subject of litigation. There is, indeed, often an appearance of profession in the courts, to decide, in cases on wills, on the intention alone. Thus, it has been said by the Lord Keeper Northington: "Every case upon wills stands upon its own circumstances, and former determinations are only of use to find out general principles to guide the judgment of the Court

(w) 2 M. & S. 12.

(x) *Ibid*, 16.

(y) 2 Mer. 128.

(a) 1 Bl. C. 69. 5 T. R. 561. 8 T. R. 68. 2 Bro. C. C. 86.

in the construction of the will before them:"(b) and by Mr. Justice Wilmot; "All cases which depend on the intention of the testator (which is the pole-star for the direction of devises) are best determined upon comparing all the parts of the devise itself, without looking into a multitude [*268] of other cases; for each stands *pretty much upon its own circumstances; and one is no rule for another, or very seldom at least:"(c) and, in a late case, by Mr. Justice Burrough: "In questions concerning the intentions of a testator, I profess to decide on the will itself, and not on cases cited."(d) It cannot, however, be doubted, that it would be a mistake to understand either of these learned judges to intend to profess, in the expressions used, to decide universally on wills independently of authority. There is reason to believe they intended to be understood simply to say, that a will is to be construed on the intention, independently of authority, unless an authority, become law,(e) compels the Court to adopt the particular construction put on a similar devise in a former will. In cases on wills, the courts first examine the words of the particular will to discover the intention; next, the legality of the intention is considered; the intention being legal, the Court then carefully deliberates on the way in which it may be best fulfilled;(f) and, lastly, it is inquired if authority, become law, forces on the Court the particular interpretation put on a similar will in a former case. It is the language of Lord Kenyon; "It is our duty in construing a will to give effect to the devisor's intention, as far as we can consistently with the rules of law; not conjecturing, but expounding his will from the words used. Where certain words have obtained a precise technical meaning, we ought not to give them a different meaning; that would be, as Lord King and other judges have said, removing land marks; but if there be no such appropriate meaning to the words used in a will, if the devisor's intention be clear, and the words used be sufficient to give effect to it, we ought to construe those words so as to give effect to the intent, and not to doubt an account of other cases which tend only to involve the question in obscurity."(g) *The courts, in cases on wills, often lament [*269] the force of authorities which they have not power to resist.(h) The chief instances in which, by reason of precedents, the intention of the testator has, by universal acknowledgment, been probably frustrated, appear to be the cases of devises without words of inheritance;(i) and the numerous dependents on *Robinson v. Robinson*.(j)

Lord Kenyon appears to have subscribed to the opinion, that it had been wise in the law originally to have required in a will the technical language of a deed.(k) "It has frequently been lamented," observed his Lordship in a case before him, "that at first, after the passing of the Statute of Wills, the courts did not require the same technical expressions in a will to pass a real estate, as are necessary in the conveying of an estate by deed; for then we should not have had more cases on the construction of wills than of deeds; and it very rarely happens now that a question arises on the construction of a limitation in a deed. There are certain received words that are well known, and have from time to

(b) 1 Eden, 95.

(c) 2 Burr. 1112.

(d) 3 Brod. & Bing. 91.

(e) See 1 Bl. C. 69.

(f) 7 T. R. 325. 2 Ves. 247.

(g) 6 T. R. 352.

(h) See 6 T. R. 353.

(i) See chap. xv, sec. xiv. p. 176.

(j) 1 Burr. 38. See chap. xiii, p. 100.

(k) See 8 T. R. 67, 502.

time been used by conveyancers in drawing deeds; and these exclude all doubt as to their legal meaning: but in expounding wills a greater latitude of construction has been allowed. After an anxious endeavour to discover the intention of a testator, it frequently happens that we can only conjecture what his intention was; and sometimes there is scarcely enough to form even a conjecture. Formerly, Sir John Bland made his own will; and, at the close of it, he said, that he had disposed of his estate in so clear a manner, that he thought it impossible for any lawyer to doubt about it. This will was afterwards contested, and it came before Lord Hardwicke, who said, that he was so utterly at a loss to conceive what was "the real intention of the testator, that he wished he could find some ground on which to form a con- [*270] jecture." (1) It may, indeed, be true, that much less litigation would be occasioned by wills if the law had originally required technical language to be used in them; but it is evident that the desired peaceful certainty of interpretation could not have been obtained, without the sacrifice of the important liberty, which every one at present enjoys, to make his own will. And notwithstanding the lamented liberty of testamentary disposition, it is probable that, of the number of wills daily opened, the proportion is very small which comes before the courts.

It is a popular complaint, that wills are hard to be understood; that often, without legal advice, they are unintelligible, and, with it, are of doubtful construction. Wills, it is true, are sometimes void, because it is impossible to collect the meaning of them; (m) but it cannot, with reason, be said to be the fault of the law, that wills are of difficult interpretation; or, if it is, it must be considered to be the fault of the indulgence, which permits the almost endless varieties of settlement by will, nor requires technical language or form to their efficacy. If persons, in the exercise of the valuable privilege to make their own wills, fail to make themselves understood; if, which often happens, with a limited knowledge of the law, they unskillfully use technical speech, or, with technical, mix popular language; plainly the fault rests with themselves, that the meaning of the will is obscure, and the exposition of it, consequently, difficult.

(1) 8 T. R. 502.

(m) *Bowman v. Milbanke*, 1 Lev. 130.

Doe v. Joinville, 3 East, 172. *Mohun v.*

Mohun, 1 Swanst. 201. *Mason v. Robinson*,

2 Sim. & St. 295.

*On the admission of collateral evidence to explain intention, the subject of Chapter III., the reader is referred to the judgment of Sir Thomas Plumer, in *Colpoys v. Colpoys*, Jacob, 451, published since that chapter was printed.

The author has, in the chapter mentioned, proposed the distinction:— if the words of a will fail to disclose an intention, collateral evidence is inadmissible to *discover* it; but if an intention *is* discovered, collateral evidence is admissible to *explain* it. (a) The judgment referred to of Sir Thomas Plumer is clearly an additional authority in favour of the latter position; and it is apprehended His Honour did not intend to be understood to say farther, that if the words of a will fail to disclose an intention, collateral evidence is admissible to *discover* it. His words are these:—"I would add, that I hope it will not be supposed that I agree to the opinion, that parol evidence is never to be let in, except in cases where there is a latent ambiguity. The admission of extrinsic circumstances to govern the construction of a written instrument is, in all cases, an exception to the general rule of law, which excludes every thing *dehors* the instrument. It is only from necessity, and then with great jealousy and caution, that courts, either of law or equity, will suffer this rule to be departed from. It must be the case of an ambiguity, which cannot otherwise be removed, and which may by these means be clearly [*272] and satisfactorily explained. This is always permitted in the *case of a latent ambiguity, which not appearing on the face of the instrument, but arising entirely from extrinsic circumstances, may always be removed by a reference to extrinsic circumstances.

"In the case of a patent ambiguity, that is, one appearing on the face of the instrument; as a general rule, a reference to matter *dehors* the instrument is forbidden. It must, if possible, be removed by construction, and not by averment. But in many cases this is impracticable; where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed: if, in such cases, the Court were to reject the only mode by which the meaning could be ascertained, namely, the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense, and the law of England (which are seldom at variance,) warrant the departure from the general rule, and call in the light of extrinsic evidence. The books are full of instances, sanctioned by the highest authorities, both in law and equity. When the person or the thing is designated, on the face of the instrument, by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the

face of the instrument. When a legacy is given to a man by his surname, and the Christian name is not mentioned; is not that a patent ambiguity? Yet, it is decided that evidence is admissible. (*Price v. Page*, 4 Ves. 680.) So, where there is a gift of the testator's stock, that is ambiguous; it has different meanings when used by a farmer and a merchant. So with a bequest of jewels; if by a [*273] nobleman, it would pass all; but if by a jeweller, it would not pass those that he had in his shop. Thus, the same expression may vary in meaning according to the circumstances of the testator.

"To shew how mistaken the idea is, that extrinsic evidence is never to be received in cases of patent ambiguity, we may refer to a case in the House of Lords, unquestionably of that description, where the evidence was admitted. I mean the case of *Doe dem. Jersey v. Smith*. Mr. Justice Bayley thus states the principle on which it was introduced: 'The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinct and accurately described; but because there is an ambiguity on the face of the instrument; because an indefinite expression is used, capable of being satisfied in more ways than one; and I look to the state of the property at the time, to the estate and interest the settlor had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest, or situation, would assist us in judging what was her meaning by that indefinite expression.' (a)

"If it were necessary, I could refer to many other instances of resorting to extrinsic matter in cases of patent ambiguity." (*Jacob*, 463—465.)

The two following cases have lately been determined in the Vice Chancellor's Court, on devises to charitable uses, the subject of Chapter II., Sec. IX.

In *Henchman v. the Attorney General*, a person devised certain copyhold lands to W. H. in fee; on condition that he, within one month after the decease of the testator, paid *to his executors 2000*l.*, [*274] which he desired to be taken as part of his personal estate, and disposed of in the same manner. And, after giving certain legacies, he disposed of the residue of his personal estate, including the 2000*l.*, in favour of charities. The testator died without any customary heir, or next of kin. Held, that the devisee took the land subject to the payment of the 2000*l.*, to which the crown, and not the lord of the manor, was entitled. (2 Sim. & St. 498.)

In *The Trustees of the British Museum v. White*, a person devised a freehold estate to trustees, in trust to sell it, and pay the proceeds to the Trustees of the British Museum, to be by them employed for the benefit of that Institution. The devise was held to be void under the statute of Geo. II. "I consider," said the Vice Chancellor, "that every gift for a public purpose, whether local or general, is within the 9 Geo. II., although not a charitable use within the common and narrow sense of those words." (*Ibid*, 594.)

Oxenforth v. Cawkwell appears to be a farther authority for the position, stated in page 133, that if land devised is in part correctly, and in

(a) 2 Brod. & B. 553.

part incorrectly described, the exposition of the will is made simply on the correct description, and the misdescription remains ineffective. A testator, who was seised of copyholds, part of which he had surrendered to the use of his will, the other part of which he had not so surrendered, devised: "And as to all and every of my freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever situate, not hereinbefore given, devised, or bequeathed, the copyhold parts thereof having been duly surrendered to the uses of this my will, I give, devise, and bequeath the same to," &c. Held, that the unsundered, as well as the surrendered, copyholds passed by the devise. (Ibid, 558.)

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